TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY, APPELLANTS,

vs.

CITY OF DECATUR

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED DECEMBER 9, 1935.

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INDEX

	Original	Print
Record from Superior Court of Fulton County	1	1
Bill of exceptions and order thereon	1	1
Petition	8	6
Summons and sheriff's returns	25	20
Answer	27	21
Amended plea and answer	44	35
Motion to dismiss petition by Georgia Ry. & Electric Co. and order overruling same	49	39
Motion to dismiss petition by Georgia Power Co. and order overruling same	54	43
Motion to dismiss petition by Georgia Ry. & Power Co. and order overruling same	59	47
Bill of exceptions pendente lite and order allowing same; Georgia Ry. & Electric Co.	64	50
Bill of exceptions pendente lite and order allowing same; Georgia Power Co.	72	57
Bill of exceptions pendente lite and order allowing same; Georgia Ry. & Power Co.	80	63

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	Original	Print
Record from Superior Court of Fulton County—Continued.		
Motion for new trial and order thereon	88	69
Amended motion for new trial	91	71
Order denying new trial	138	110
Brief of evidence	139	110
Offers in evidence	139	110
Notice of paving ordinance	140	111
Ordinance for paving	141	112
Assessing ordinance	144	114
Marshal's return	147	117
Stipulation as to certain property	147	117
Notice of street improvement and bill for improvement	148	118
Stipulation as to certain facts	149	118
Annual returns for taxation	151	120
Stipulation of facts	153	122
Testimony of Preston S. Arkwright	156	124
Order Approving brief of evidence	157	125
Verdict	157	125
Decree	158	126
Clerk's certificate [omitted in printing]	159	
Proceedings in Supreme Court of Georgia	161	127
Order on mandate of Supreme Court of the United States	161	127
Opinion, Graham, J.	164	129
Concurring opinion, Gilbert, J.	184	145
Dissenting opinion, McLaughlin, J.	184	145
Judgment	185	146
Petition for appeal	186	146
Assignments of error	193	151
Supersedeas and cost bond on appeal [omitted in printing]	211	
Order allowing appeal	216	159
Praecipe for transcript of record	219	160
Notice of praecipe	221	161
Citation and service [omitted in printing]	222	
Praecipe for additional portions of record	224	161
Motion for further consideration	225	162
Clerk's certificate [omitted in printing]	240	
Statement of points to be relied upon and designation as to printing record	241	160

[fol. 1]

IN SUPREME COURT OF GEORGIA

No. 91639

GEORGIA POWER COMPANY, GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY, Plaintiffs in Error,

vs.

CITY OF DECATUR, Defendant in Error

BILL OF EXCEPTIONS—Filed Oct. 19, 1933; Filed in Supreme Court Nov. 1, 1933

GEORGIA,
Fulton County:

Be it remembered that on the 21st day of June 1933, at the regular term of the superior court of Fulton County, before the Honorable G. H. Howard, judge of the superior court, Atlanta Circuit presiding, there came on to be tried before said court (the superior court of Fulton County) and a jury the case of City of Decatur against the Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action seeking to recover a judgment against each of said named defendants to collect a certain claimed paving assessment.

Be it further remembered that prior to the time just heretofore stated, and on the 31st day of March 1933, before the Honorable E. D. Thomas, judge of the superior court of Fulton County, Georgia, there came on to be heard in said case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company motions made and filed by each of said named defendants to dismiss the petition filed in said case upon the grounds set out and stated in a motion filed by each of said defendants in said case. That on the 31st day of March, 1933, the said Honorable E. D. Thomas, judge of the superior court of Fulton County presiding, overruled each of said motions filed by each of said named defendants upon each and all of the grounds of said motion to dismiss said petition.

[fol. 2] To the judgments of said court overruling each of said motions filed by each of the said defendants, each of said defendants filed their bill of exceptions pendente lite, the same being duly certified by the said Honorable E. D. Thomas, as required by law, the said bill of exceptions pendente lite being made a part of the record in said case.

To the rulings and judgment of said court overruling each of said motions of each of said defendants, as excepted to in said bill of exceptions pendente lite, each of the plaintiffs in error, Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, now assign error on the rulings and judgments of the court overruling the motions made by each of said plaintiffs in error to dismiss the petition in said case, and each of said plaintiffs in error say that the court erred in not sustaining their said motions to dismiss said petition and erred in not sustaining said motions on each of the grounds of said motions, and plaintiffs in error now assign error upon said rulings of the court on each and all of the grounds taken by each of said plaintiffs in error in their exceptions pendente lite duly filed, certified to and made a part of the record in said case, and error is now assigned upon each of the grounds as set out in each of said exceptions pendente lite and upon said exceptions pendente lite.

Be it remembered that thereafter the said case (as heretofore stated) came on to be tried in the superior court of Fulton County, Georgia, before the Honorable G. H. Howard judge presiding and a jury, and on the 26th day of June, 1933, the said court directed a verdict in favor of the plaintiff and the jury upon the direction of the court found a verdict in favor of the plaintiff for the amount sued for [fol. 3] in said case with interest thereon from June 21st, 1926, at the rate of 7 per cent. per annum, and upon direction of the court further found that the plaintiff was entitled to a decree against the Georgia Power Company and Georgia Railway & Power Company for the amount sued for and interest thereon, and upon said verdict as directed the said court, Honorable G. H. Howard presiding, did on the 26th day of June 1933, enter a decree in favor of the plaintiff in said case and against the Georgia Railway & Power Company and Georgia Power Company for the amounts as above stated.

Each of the defendants in said case Georgia Railway & Power Company, Georgia Railway & Electric Company and Georgia Power Company thereafter in regular course and within the time provided by law each filed its motion for a new trial and each of said motions for a new trial filed by each of said defendants was thereafter duly and regularly amended, the grounds of the original and amended motions being approved by said court and said motions, as amended, being duly filed and made a part of the record in said case.

In regular course and within the time prescribed and provided by law plaintiffs in error had approved and filed as part of the record in said case a brief of evidence introduced in the hearing of said case. There was no charge of the court in said case for the court, after the conclusion of the evidence, directed a verdict in favor of the plaintiff in said case.

Said motion for a new trial, as amended, came on for a hearing before the Honorable G. H. Howard, judge of said court presiding, on the 14th day of October, 1933, and on said date (October 14th, 1933) the said court overruled each and all of the grounds of said original and amended motions for a new trial. To this judgment of the court over-[fol. 4] ruling said original and amended motions for a new trial upon each and all of the grounds thereof, the defendants, Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, now plaintiffs in error, excepted and now except and assign error thereon and say that the court erred in overruling said motion for a new trial, as amended, on each and all of the grounds therein stated and say that the court should have sustained said motion for a new trial upon each and every ground as set out in the original and amended motions for a new trial and each of said defendants, now plaintiffs in error, then excepted and now except and assign error upon said ruling of the court.

Plaintiffs in error, and each of them, specify the following portions of the record in said case as material to a clear understanding of the errors set out and assigned in this bill of exceptions and the bill of exceptions excepting to the errors set out and assigned in the bill of exceptions pendente lite heretofore referred to:

(1) The original petition in said case filed on the 17th day of November, 1932.

(2) The answers and amended answers and pleas of the defendants, Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company;

(3) The motions filed by each of said defendants in the court below to dismiss the petition filed in said case and the ruling of the court overruling each of said motions to dismiss the petition;

(4) The exceptions pendente lite filed by each of the defendants in the court below to the order of the court overruling the motion to dismiss said petition, certified to and filed as part of the record in said case on the 10th day of April, 1933, together with the certificate and order of the court making said exceptions pendente lite a part of the record in said case;

[fol. 5] (5) The motion for a new trial in said case, together with the order thereon;

(6) The amended motion for a new trial, together with the order thereon;

(7) The brief of the evidence in said case, with the order of approval and the orders and entries thereon;

(8) The verdict of the jury as entered in said case;

(9) The decree of the court entered upon said verdict;

(10) The judgment of the court overruling the motion for a new trial, as amended, on the 14th day of October, 1933.

And now within the time allowed by law and within 20 days from the overruling of the motion for a new trial in said case, come Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, plaintiffs in error, and present this their bill of exceptions, and pray that the same may be signed and certified as provided by law, that the errors alleged to have been committed may be considered and corrected by the Supreme Court of Georgia.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Plaintiffs in Error, Georgia Railway & Electric Company, Georgia Railway & Power Company, Georgia Power Company. Post Office Address: 1607 William-Oliver Building, Atlanta, Georgia.

[fol. 6] ORDER ON BILL OF EXCEPTIONS

I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of in this bill of exceptions and the clerk of the superior court of Fulton County is hereby ordered to make out a complete copy of the portions of the record in said case which are in said bill of exceptions specified and certify the same as such and cause the same to be transmitted to the present term of the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This the 19th day of October, 1933.

G. H. Howard, Judge S. C. A. C.

Acknowledgement

Due and legal service of the foregoing bill of exceptions is hereby acknowledged, copy received and all other and further notice and service is hereby waived.

This 19th day of October.

Branch & Howard, Howell, Heyman & Bolding, Attorneys for defendant in error.

[File endorsement omitted.]

GEORGIA,
Fulton County:

I hereby certify, that the foregoing bill of exceptions hereunto attached, is the true original bill of exceptions in the case stated, to wit: Georgia Railway & Electric Co. et al., plaintiff in error, vs. City of Decatur, defendant in error, and that a copy hereof has been made and filed in this office.

[fol. 7] Witness my signature and the seal of court affixed this the 29th day of October 1933.

Lee Earl Largen, Deputy Clerk Superior Court Fulton County, Georgia Ex-Officio Clerk City Court of Atlanta. (Seal.)

[File endorsement omitted.]

[fol. 8] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed Nov. 17, 1931

GEORGIA,
Fulton County:

To the Superior Court of said County:

The petition of the City of Decatur, a municipal corporation of the State of Georgia, shows as follows:

1. Defendants are Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company.

2. Each of said defendants is a corporation having its principal place of business and agents in Fulton County, Georgia.

3. Georgia Power Company is a consolidated corporation chartered under the laws of the State of Georgia and particularly under the provisions of the law as contained in Sections 2607 et seq. of the Civil Code of Georgia, and is composed of certain constituent corporations, among others being Georgia Railway & Power Company and Georgia Railway & Electric Company.

4. The charter creating said consolidated corporation under the name of Georgia Power Company was granted by the Secretary of State of the State of Georgia on February 25th 1927.

Georgia Railway & Electric Company formerly owned and operated a street car system in the City of Atlanta, Fulton County, Georgia, and in the City of Decatur, DeKalb County, Georgia, and as a part of said system operated lines between Atlanta and Decatur and other points near Atlanta.

6. On, to wit: January 1st, 1912, Georgia Railway & Electric Company by lease contract conveyed and leased to Georgia Railway & Power Company for the term of nine hundred ninety-nine (999) years all of its property of every kind, consisting of its street car system, franchises and all other real and personal property, the said lease among other things providing:

[fol. 9] "The Lessor doth hereby grant, demise and lease unto the Lessee all and singular its railroads, electric

power and steam heating plants and systems, lands, franchises, contracts and other property of every description, real and personal; now owned or hereafter to be acquired by the Lessor, and all its franchises, rights, privileges, easements, permits, licenses and appurtenances thereunto belonging or otherwise, including the right to demand and receive to the Lessee's own use all tolls, rents, revenues, income and profits, but excepting its corporate seal and books of record and account, and its deeds, grants, plat and other instruments and documents containing or constituting the evidence of its right and title to the property now or hereafter owned or operated by it; and excepting the shares of stock and bonds of other corporations now or hereafter owned by the Lessor, but including all the income derived or receivable from such shares and bonds (all of which are herein after referred to as the demised premises).

"Provided always that this lease be subject to the several mortgages now existing upon all or any part of the demised premises.

"To have and to hold the same unto the Lessee, its successors and assigns, for the term of 999 years from the 1st of January, 1912.

Lessee's Covenants

The Lessee covenants that it will pay, satisfy and discharge as the same shall become due and payable all taxes rates, charges, licenses and assessments, general and special, ordinary and extraordinary, of every nature and description which have been or may be lawfully imposed or assessed during the continuance of this lease in any way upon the lessor or upon the lessee, either with reference to the capital stock or income of the lessor, or to the prop-
[fol. 10] erty, earnings, contracts, rights, privileges or franchises hereby demised, or to the sum of money payable by the lessee hereunder to the shareholders of the lessor or otherwise; and also that it will pay all sums of money which the lessor now may be or hereafter become liable to pay by law, contract or otherwise, for the possession, enjoyment or perpetuation of any *of any* of its rights, powers, privileges or franchises; said payments to be made as the same become due to the officers of other persons entitled by law to receive the same; and, in the

event that the lessee shall fail to make any such payments when the same become due, the lessor may at any time thereafter make such payments and recover the amount thereof with interest thereon from the date of such payments and all costs, attorney's fees and other expenses from the lessee, without prejudice to any rights secured to the lessor by this lease for breach of any covenants hereof, it being understood and agreed however, that, if the lessee shall desire to resist by legal proceedings the payment of any tax or assessment, and shall so notify the lessor and the lessee shall commence such legal proceedings in good faith the lessor shall not pay nor shall the lessee be obliged to pay any such tax or assessment until 30 days after the final adjudication thereupon by the court having jurisdiction in such case, and, in the event that the lessee shall take an appeal from any adjudication upon such tax or assessment, then the lessor shall not pay nor shall the lessee be obliged to pay such tax or assessment until 30 days after final adjudications upon such appeal.

"23. The lessee hereby assumed all the contracts and other obligations of the lessor and covenants that it will pay all the indebtedness of the lessor shown by its books and records, and also covenants that it will assume and pay all other debts, obligations and liabilities, both present and future, of the lessor (except the principal of bonds [fol. 11] and except any liabilities incurred by the lessor contrary to its covenants herein contained, but including all obligations to pay and provide sinking funds) and all the liabilities of the lessor for injuries or damages to persons or property, and that it will defend, at its own expense, all actions now pending or hereafter brought against the lessor on account of claims for such liabilities, the lessee to be subrogated, however, to the benefit of any contract or undertaking with any person or persons indemnifying or protecting the lessor against such indebtedness and liabilities; and also that it will pay all the interest and sinking fund charges on all bonds of the Atlanta Gas Light Company and of the Atlanta Northern Railway Company, now outstanding or that may hereafter be issued with the consent of the lessee.

"26. The lessee further covenants that it will perform all the obligations imposed upon the lessor by law or by the provisions of its grants from or contracted with any

State, city, town, or county, in relation to the demised premises, and not do or suffer to be done or omitted any act or things which shall be ground for forfeiture of any of the franchises, rights and privileges or easements derived thereunder for the construction and maintenance and operation of said street suburban and interurban railroads, electric power and steam heating plants and systems, or any part thereof, of which the lessee shall at any time be in possession under this lease, or which shall be a breach of any condition or obligation on imposed upon the lessor by the mortgagees of the lessor, or by any other contract entered into by the lessor; and that the lessee will not suffer, permit or consent to any alterations or changes in any such franchises, rights or privileges without the written consent of the lessor; and said lessee shall and will hold the lessor harmless from all liability, cost or expense arising during the terms hereby created for or [fol. 12] upon the bonds, if any, heretofore or hereafter executed to any city, town, or county conditioned for the faithful performance of the obligations of the lessor under its grant form or contract with any such city, town or county."

7. Part of the property conveyed by said lease to Georgia Railway & Power Company was a street car line and franchises in the City of Decatur, located partly on what is known as East Ponce de Leon Avenue in the City of Decatur.

8. On to wit: the 15th day of May 1925, it was ordained by the Commissioners of the City of Decatur as follows:

"Whereas, the Commissioners of the City of Decatur, by virtue of the authority granted them under the charter of said city, have full power and authority, in their discretion, to grade, pave, macadamize, or otherwise improve the travel and drainage of the streets, squares, public alleys and lanes of said city; and,

"Whereas, it is necessary for the public travel and drainage of said streets, that the same should be improved; and,

"Whereas, it is the judgment of the Commissioners of said city, and by this ordinance they so declare, that the pavement of said streets with 5" Asphaltic Concrete, and

with granite cubes between the tracks of the street car company and for two (2) feet on each side thereof, and that granite cubes and ties of the car tracks be firmly set in a concrete base and the cubes grouted with asphaltic or cement, according to the specifications and plans of the City Engineer, will probably improve said streets for the travel and drainage thereof, and that such improvements are necessary for such travel and drainage; and,

Whereas, the Commissioners of the said city are authorized under the charter of said city, to assess the cost, in full, for the paving between the tracks and for two (2) [fol. 13] feet on each side thereof of the Street Railway Company, and to assess the remaining cost of said paving against the real estate abutting on such street; one-half of such remaining cost to be assessed against the real estate abutting on one side of said streets, and one-half of said remaining cost to be assessed against the real estate abutting on the other side of said streets, where paved.

Therefore be it ordained by the commissioners of the City of Decatur, and it is hereby ordained by authority of the same, that North Oak Street from East Howard Avenue to East Ponce de Leon Avenue and East Ponce de Leon Avenue from East Court Square to Sycamore Drive be improved by paving the same with 5" Asphaltic concrete and with granite cubes between the tracks of the Street Railway Company, and for two (2) feet on each side thereof, and that the granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphalt or cement.

Be it further ordained, that when said street has been so improved, the City Manager of said city, shall make up an assessment roll of the cost of such improvement, showing the total cost thereof and showing the total cost between the tracks of said Railway Company and for two (2) feet on each side thereof, and showing the remaining cost of such improvement; that is the cost after deducting from the total cost the cost of the paving of said tracks and for two (2) feet on each side thereof and showing the number of feet of real estate abutting on each side of said streets, where paved, and the cost per lineal foot on each side of said streets, where paved, as provided by the charter of said City.

"Be it further ordained, when the City Manager shall furnish to the commissioners such assessment roll, they [fol. 14] shall adopt an ordinance making an assessment against the Georgia Railway & Power Company for the total cost of the pavement between the tracks of said company and for two (2) feet on each side thereof; against the real estate abutting on each side of said streets, and against the owners thereof at the time of making said assessment; such remaining cost.

"Be it further ordained, that such assessment be a lien against said street railway company and against said property from the time of making said assessment, in terms of the charter of said city.

"Be it further ordained, that upon adoption of said ordinance making said assessment, the clerk of the commissioners shall notify the respective owners of such property, and the Georgia Railway & Power Company the amount of the assessment against their said properties, and he shall give them ten (10) days in which to make payment thereof and after ten (10) days he shall issue fi. fas. against the property, and the said owners thereof and against the Georgia Railway & Power Company for all assessments which may be in default as provided by the charter of said city, which fi. fas. shall be turned over to the Marshal of said city for levy and sale, if not paid.

"Be it further ordained, that said clerk shall publish notices of the introduction of this ordinance notifying the public and parties interested by publication in DeKalb New Era, one time, at least ten (10) days before the adoption of this ordinance and such notice shall contain a statement of the street to be improved, the kind of pavement to be made; the date of the meeting of the Commissioners at which such ordinance will be considered for adoption, and the same may be adopted at such meeting or some subsequent meeting, in the discretion of the Commissioners; and any person interested in such improvement may file his objection to the adoption of such ordinance with the [fol. 15] City Clerk and be heard by said Commissioners, if he may desire to appear and be heard.

"Be it further ordained, that all ordinances or parts of ordinances in conflict herewith be, and the same are hereby repealed."

9. And subsequently, to wit: On May 21st, 1926, after the paving as provided for in said ordinance had been completed, an ordinance was adopted by the Commissioners of the City of Decatur, as follows:

"Whereas, the Commissioners of the City of Decatur by ordinance adopted May 15, 1925, providing for paving East Ponce de Leon Avenue, from East Court Square to Sycamore Drive, in the City of Decatur; and,

"Whereas, said ordinance provided for the cost of paving between the tracks of the Georgia Railway & Power Company, and for two (2) feet on each side thereof be assessed against the Georgia Railway & Power Company, and provided, that one-half of the remaining cost for paving said avenue be assessed against the real estate abutting on the North side of said avenue, and that the other one-half of said remaining cost be assessed against the real estate abutting on the south side of said avenue; and

"Whereas, said East Ponce de Leon Avenue has been paved by the City of Decatur in accordance with said ordinance, adopted on May 15th, 1925; and,

"Whereas, the total cost of paving said avenue, according to the assessment roll of the City Manager, is $42,-242.07 and,

"Whereas, the cost of paving between the tracks of the Georgia Railway & Power Company and for two (2) feet on each side thereof is $13,444.66; and

"Whereas, one-half of the remaining cost of paving said avenue, is $14,397.70; and

[fol. 16] Whereas, there are 369992 feet of real estate abutting on the north side of said avenue and 3699 feet of real estate abutting on the south side of said avenue; and

"Whereas, the cost per lineal foot be assessed against the real estate abutting on the north side of said avenue, is $3,89-½ per foot; and

"Whereas, the cost per lineal foot be assessed against the real estate abutting on the south side of said avenue, is $3.89½ per lineal foot;

"Therefore be it ordained by the Commissioners of the City of Decatur, and it is hereby ordained by authority of the same that for the paving of said Ponce de Leon Avenue between East Court Square and Sycamore Drive, the sum of $13,444.66 is hereby levied and assessed against

the Georgia Railway and Power Company and against the property of said company, and the same being the cost of paving between tracks of said company and for two (2) feet on each side thereof, as said tracks run in and along said avenue.

"Be it further ordained by the authority aforesaid, that the sum of $3.89½ per lineal foot is hereby levied and assessed against the real estate abutting on the North side of Ponce de Leon Avenue from East Court Square to Sycamore Drive, for the paving of said avenue, the same amounting to the sum of $14,397.70, and for one-half of said remaining cost for the paving of said avenue.

"Be it further ordained by the authority aforesaid, that the sum of $3.89½ per lineal foot is hereby levied and assessed against the real estate abutting on the south side of Ponce de Leon Avenue from East Court Square to Sycamore Drive, for the paving of said avenue the same amounting to the sum of $14,397.70, for one-half of said remaining cost for the paving of said avenue.

[fol. 17] "Be it further ordained, that the City Clerk shall give notice to the Georgia Railway & Power Company the amount of the assessment made against said company for the paving of said street, and give them ten (10) days in which to make payment thereof.

"Be it further ordained, that the City Clerk shall give the owners of the real estate abutting on said avenue between East Court Square and Sycamore Drive the amount of the assessment against their respective properties, and give them ten (10) days in which to make payment thereof.

"Be it further ordained, that after the expiration of said ten (10) days, the City Clerk shall issue an execution against the Georgia Railway & Power Company for the cost of paving between its tracks and for two (2) feet on each side thereof, if said company shall be in default in making payment of said assessment, and shall likewise issue executions against the respective parcels of real estate abutting on said avenue between East Court Square and Sycamore Drive, and against the owners thereof, if such owners are in default after said ten (10) days, and shall turn all such executions over to the Marshal of said City who shall proceed to make collections thereof by levy and sale, as provided by the charter of the City of Decatur.

"Be it further ordained, that all ordinances and parts of ordinances in conflict herewith be and the same are hereby repealed."

10. During all of said time; that is, when said ordinances, as hereinabove referred to, were adopted and when the paving work was completed, the defendant, Georgia Railway & Power Company, was in possession of all of the property, rights and franchises of the defendant, Georgia Railway & Electric Company, under and by virtue of the nine hundred and ninety-nine (999) year lease hereinabove referred to.

[fol. 18] 11. Georgia Railway & Power Company neglected, failed and refused to pay the assessment against it under said ordinances above set out, and in accordance with the provisions of the assessment ordinance, above set out, a fi. fa. was issued by the Clerk of the City of Decatur as follows:

"STATE OF GEORGIA,
County of DeKalb,
City of Decatur:

"To the Marshal of City of Decatur, Greetings:

"Whereas, the Commissioners of the City of Decatur on May 15th, 1925, provided for the paving between the tracks of the Georgia Railway & Power Company and for two (2) feet on each side thereof with assessment of costs thereof against said Georgia Railway & Power Company; and

"Whereas, the Commissioners of the City of Decatur on May 21sf, 1926, after the paving of said East Ponce de Leon Avenue had been completed, did by ordinance make an assessment against the Georgia Railway & Power Company for the cost of paving between its track and for 2 feet on each side thereof on said Ponce de Leon Ave.; the cost of said paving between the tracks of said company, and for 2 feet on each side thereof amounted to $13,444.66.

"Now, therefore, your are hereby commanded that of the goods and chattels, lands and tenements of the Georgia Railway & Power Company, a corporation of the State of Georgia, you cause to be made by levy and sale thereof, the sum of $13,444.66, the amount of the assessment of the Commissioners of the City of Decatur against said Georgia Railway & Power Company, made and assessed on the 21st

day of May, 1926, for the paving of East Ponce de Leon Avenue in said city, between the tracks of the Georgia Railway & Power Company, and for 2 feet on each side thereof in accordance with the laws and ordinances of the City of Decatur. Also $1.50 costs for issuing and [fol. 19] collecting this execution and a sufficient amount to cover interest on said sum of $13,444.66 at the rate of 7% per annum from the date of this execution until satisfied together with all other costs which may hereafter accrue, as provided by law; and have you this execution and said sums before the Commissioners of said City in payment of said assessment in accordance with the laws and ordinances of said city.

"Witness the Honorable Commissioners of the City of Decatur.

"Given under my hand and seal of the City of Decatur, this 21st day of June, 1926.

"J. S. Loony, City Clerk."

12. Thereafter, on July 6th, 1927, the said fi. fa. was by M. D. Goodger, Marshal of the City of Decatur, levied upon property located in the City of Decatur and described as follows:

All that tract or parcel of land, lying and being in the City of Decatur in Land Lot No. 235, in the 15th District of DeKalb County, Georgia, and more particularly described as follows:

"Beginning at a point on the southern side of College Ave. 208 feet northeasterly from the southeast corner of College Ave. and Candler Street, and running thence northeasterly along the southern side of College Ave. 83 feet, to the lot of C. G. Harrison, thence southeasterly along the western side of the Harrison lot 243 feet, more or less, to an alley; thence southwesterly along the northern side of the said alley 79.1 feet; thence northwesterly 7.5 feet to an 8 foot alley; thence northeasterly along the eastern side of said alley 196.2 feet to the point of beginning.

[fol. 20] "Levied on as the property of the Georgia Railway & Power Company, a corporation, to satisfy fi. fa. in favor of the City of Decatur and against the said Georgia Railway & Power Company, and against the property of said Georgia Railway & Power Company for the paving between the tracks of the Georgia Railway & Power Co.

and for 2 feet on each side thereof, on Ponce de Leon Avenue from Oak Street to Court House Square in said City of Decatur. Georgia Railway & Power Company notified of this levy."

13. The property levied upon, as aforesaid, was held by Georgia Railway & Power Company as a part of the properties conveyed to it by the nine hundred ninety-nine (999) year lease, hereinabove referred to, said property having at the time of the execution of said lease belonged to the defendant, Georgia Railway & Electric Company.

14. Said property had and has located upon it what is known as a substation, which is used by the defendants in connection with the operation of its street car and electric lighting systems in and around the City of Decatur; the same was located near the Georgia Railroad Depot in the City of Decatur but does not abut upon East Ponce de Leon Avenue, the street paved under and by virtue of the ordinances hereinabove referred to.

15. Said levy, above referred to, having been made, the Georgia Power Company, the consolidated corporation which had been organized and chartered as hereinabove set forth, filed a statutory claim to said property, which statutory claim was subsequently amended by the filing of a bill in equity in aid thereof.

16. Georgia Power Company claimed title to said property under and by virtue of the consolidated agreement under which it, Georgia Power Company, was organized and charactered as hereinabove set out.

[fol. 21] 17. Georgia Power Company in its said claim, among other things, claimed that said property was not subject to levy and sale by reason of the fact that the same was a necessary part of the property used by it and in connection with its duties as a quasi-public service corporation.

18. Under the provisions of the consolidation agreement and of the charter under which the defendant, Georgia Power Company, was organized, it is provided:

"XI. Upon the making and perfecting of this joint agreement and the filing of the same in the office of the Secretary of State, and upon the issuance by the Secretary

of State of his certificate that the provisions of Sections 2607, 2608, and 2609 of the Code of Georgia of 1910 have been complied with the Consolidated Corporation shall thenceforth constitute a corporation by the name provided in this joint agreement. Then and thereafter the Consolidation Corporation shall be possessed of all the rights, privileges, powers and franchises as well of a public as of private nature, and be subject to all the duties, liabilities, debts and obligations of each of the Constituent Corporations participating in this joint agreement, and thereupon the corporate franchises, entity and existence of the Constituent Corporations shall pass to and be consolidated into the Consolidated Corporation and the Consolidated Corporation shall be fully vested therewith and the corporate existence of the Constituent Corporations shall cease except as consolidated into the Consolidated Corporation or as may be requisite for carrying out the purposes of this joint agreement or as continued by statute.

"XII. Upon the taking effect of this joint agreement, all and singular the rights, privileges and franchises of each of the Constituent Corporations and all property, real, personal and mixed, and all debts due on whatever account, [fol. 22] as well for stock subscriptions, and all other things in action of or belonging to each of the Constituent Corporations, shall be and hereby are granted, conveyed, assigned, transferred and vested in the Consolidated Corporation its successors and assigns, without further act or deed; and all rights, properties privileges and franchises and all and every other interest shall be thereafter as effectually *and* property of the Consolidated Corporation as they were of the Constituent Corporations and the title to any of the real estate vested in the Constituent Corporations, whether by deed or otherwise, shall not revert or be in any way impaired by reason of this joint agreement or of the consolidation of the Constituent Corporations into the Consolidated Corporation; provided, that the rights of creditors and all liens upon the property of the Constituent Corporations shall be preserved unimpaired, but limited in lien to the property affected by such liens at the time this joint agreement shall become effective, and the Constituent Corporations may be deemed to continue in existence in order to preserve the same; and all debts, liabilities and

duties of the Constituent Corporations shall thenceforth attach to the Consolidated Corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it."

"If at any time the Consolidated Corporation shall deem it advisable or be advised that any further assignments, assurances in the law or other acts and instruments are necessary or desirable to vest in the Consolidated Corporation, its successors and assigns, the title to any property of the Constituent Corporations and their proper officers and directors shall and will do all such acts and things as may be necessary or proper to vest the title to such property in the Consolidated Corporation, or its successors or assigns, [fol. 23] and otherwise to carry out the purposes of this joint agreement."

19. The claim case herein above referred to came on for hearing in DeKalb Superior Court, and the trial in DeKalb Superior Court resulted in a verdict and judgment in favor of the City of Decatur, but the claimant, Georgia Power Company appealed said case to the Supreme Court of Georgia and the judgment rendered in DeKalb Superior Court was by the Supreme Court of Georgia reversed.

20. Thereafter, the case came on for trial again in DeKalb Superior Court and that trial resulted in a verdict against the company and in favor of the City of Decatur, holding, in effect, that said property was subject to the fi. fa.

21. From this judgment the claimant, Georgia Power Company, again appealed to the Supreme Court of Georgia, and the Supreme Court of Georgia again reversed the judgment, holding, in effect, that said property was not subject to levy and sale for the reason that it was a necessary part of the property and equipment of the Georgia Power Company in connection with its service as a quasi-public service corporation.

22. Petitioner shows that under the law it cannot levy upon the tracks of the street car line located in the City of Decatur for the reason that these tracks constitute a part of the main line of the street car system operated by the defendants to and through the City of Decatur.

23. Petitioner shows further that the defendants have no property located in the City of Decatur, which is subject to levy and sale because of the fact that all such property is used in connection with the business of the defendants as a quasi-public service corporation.

23. Petitioner is therefore without any legal remedy for the enforcement of said assessment and fi. fa. and the [fol. 24] collection of the amount due to it by the defendants, as herein set out.

24. The defendant, Georgia Power Company, the consolidated corporation, is under the legal duty and obligation to pay said assessment, but as hereinbefore set out it fails and refuses to pay the same.

25. Petitioner being legally entitled to collect said assessment and defendant being under the obligation to pay the same, but petitioner being without any legal means or remedy to enforce the payment of the same, it is compelled to seek the aid of a court of equity.

Wherefore, petitioner prays that process issue requiring said defendants, and each of them, to be and appear at the next term of this court to answer this complaint; that the court by its proper decree in this cause decree that the plaintiff is entitled to the collection of the amount due to it as aforesaid; that is, the amount of said assessment, together with legal interest thereon since the same was due; and that the court further decree that the defendants are under the legal duty and obligation to pay the same; and that judgment be rendered against said defendants for the amount of said indebtedness; and that a decree be molded so as to provide that the plaintiff is entitled to collect the same out of any property of the defendant that may be found subject to levy and sale; and petitioner prays that such other and further relief be granted to it as may be necessary to the end that the defendants be required and compelled to pay the plaintiff and the plaintiff be enabled to recover and collect of the defendants the amount due to the plaintiff as set forth in this petition.

Branch & Howard, Petitioner's Attorneys.

[fol. 25] IN SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA,
County of Fulton,

CITY OF DECATUR

versus

GEORGIA POWER COMPANY, GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY

Complaint

SUMMONS—Filed Nov. 17, 1931

To the Sheriff or his Deputy of said County, Greeting:

The defendants are hereby required, personally or by attorney to be and appear at the Superior Court, to be held in and for said County, on the first Monday in January, 1932, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness the Honorable John D. Humphries, Judge of said cour, this 17 day of Nov. 1931.

Geo. F. Haney, Deputy Clerk.

[File endorsement omitted.]

[fol. 26] GEORGIA,
Fulton County:

Served the defendant Georgia Railway & Electric Co., a corporation by serving P. S. Arkwright Pres. by leaving a copy of the within writ and process with him at the office and place of doing business of said corporation, in Fulton County, Ga.

This Nov. 20, 1931.

D. M. Goodlin, Deputy Sheriff.

GEORGIA,
Fulton County.

Served the defendant Georgia Railway & Power Co. by serving P. S. Arkwright, Pres. by leaving a copy of the

within writ and process with him at the office and place of doing business of said corporation, in Fulton County, Ga.
This Nov. 20, 1931.

D. M. Goodlin, Deputy Sheriff.

GEORGIA,
Fulton County:

Served the defendant Georgia Power Co., a corporation by serving Miss Marion Edwards Chief Clerk by leaving a copy of the within writ and process with her at the office and place of doing business of said corporation in Fulton County, Ga.
This Nov. 19, 1931.

D. M. Goodlin, Deputy Sheriff.

[fol. 27] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ANSWER—Filed Jan. 22, 1932

And now come Georgia Power Company and Georgia Railway & Power Company and Georgia Railway & Electric Company and each of said corporations file the following as its separate plea and answer in said suit and for said plea and answer say:

(1) Defendants, and each of them, admit the allegations of paragraphs 1 and 2 of the petition.

(2) In answer to paragraph 3 of the petition defendants and each of them, admit that the Georgia Power Company is a corporation, chartered under the laws of the State of Georgia and admit that several other constituent corporations were consolidated into the Georgia Power Company under and by virtue of the laws of the State of Georgia. Defendants, and each of them, say that the charter of the Georgia Power Company was granted by the Secretary of the State of Georgia and that the court will take judicial cognizance of said charter and its provisions. Defendants, and each of them, deny the allegations of paragraph 3 of the petition in so far as they may in any way conflict with the charter of the Georgia Power Company.

(3) Defendants, and each of said defendants, deny the allegations of paragraph 4 of the petition.

(4) Defendants, and each of said defendants, deny the allegations of paragraph 5 of the petition.

(5) In answer to paragraph 6 of the petition, defendants, and each of said defendants, admit that on the 1st day of [fol. 28] January 1912, the Georgia Railway & Electric Company executed a lease to the Georgia Railway & Power Company and each of said defendants admit that portions of said lease are set out in said paragraph.

(6) In answer to paragraph 7 of the petition defendants, and each of said defendants, say that by virtue of said lease the Georgia Railway & Power Company operated a street car line in Decatur under a franchise granted by the City of Decatur. That said line was located in the municipality of Decatur and located partly on what is known as East Ponce de Leon Avenue in the City of Decatur.

(7) In answer to paragraph 8 of the petition defendants, and each of said defendants, admit that on the 15th day of May, 1925, the Commissioners of the City of Decatur enacted the purported ordinance as set out in said paragraph. For the reasons hereinafter set out each of said defendants deny that said purported ordinance authorizes or permits the instant suit and allege that if it is construed as contended by plaintiff it is invalid, illegal and unconstitutional as hereinafter set out. Each of said defendants alleges that said purported ordinance, and the acts under which the same is claimed to have been passed, if construed as contended for by plaintiff in the instant suit, are illegal and invalid and unconstitutional and violative of the constitutional provisions of the State of Georgia, and of the constitutional provisions of the United States as hereinafter set out.

(8) In answer to paragraph 9 of the petition, each of the defendants say that said paragraph sets out a correct copy of a purported ordinance, but as hereinafter set out defendants allege that said purported ordinance, and the acts under which the same is claimed to have been passed, if construed as contended for by plaintiff in the instant suit, are illegal and invalid and unconstitutional and vio- [fol. 29] lative of the constitutional provisions of the State

of Georgia and of the constitutional provisions of the United States as hereinafter set out.

(9) In answer to paragraph 10 of the petition each of said defendants deny said paragraph as alleged. Each of the defendants admit that at the time of the adoption of said purported ordinances the Georgia Railway & Power Company was in possession of the car line in the City of Decatur and the franchise under which it was constructed and operated, which, as heretofore stated, was located within the municipality of Decatur and partly located on what is known as East Ponce de Leon Avenue in the City of Decatur.

(10) In answer to paragraph 11 of the petition each of the defendants deny said allegations as alleged. Each of said defendants say that the special paving assessment sought to be made against the Georgia Railway & Power Company under said ordinance were and are illegal and invalid and unconstitutional for the reasons hereinafter set out and that the said fi. fa. as issued against the Georgia Railway & Power Company is illegal, invalid and unconstitutional. Each of said defendants admit that said paragraph sets out a correct copy of the purported fi. fa. issued by the Clerk of the City of Decatur, but each of said defendants say that said fi. fa. was and is illegal and unconstitutional for the reasons hereinafter set out.

(11) In answer to paragraph 12 of the petition each of said defendants admit that said fi. fa. was levied upon certain property located in the City of Decatur as described in said paragraph.

(12) In answer to paragraph 13 of the petition each of said defendants admit the allegations as therein alleged.

[fol. 30] (13) In answer to paragraph 14 of the petition each of said defendants say that said paragraph is substantially correct.

(14) In answer to paragraph 15 of the petition each of said defendants admit that said paragraph is substantially correct.

(15) In answer to paragraph 16 of the petition it is admitted that the Georgia Power Company claimed title to the property levied on.

(16) In answer to paragraph 17 of the petition each of said defendants admit that said claim as filed by the Georgia Power Company, among other things claimed that the property levied on was not subject to levy and sale under the assessment and fi. fa. in question.

(17) In answer to paragraph 18 of the petition each of the defendants admit that a part of the consolidated agreement is correctly set out in said paragraph.

(18) In answer to paragraphs 19 and 20 of the petition each of said defendants admit the allegations as therein set out.

(19) In answer to paragraph 21 of the petition each of said defendants admit that the Georgia Power Company appealed said case to the Supreme Court of Georgia and that the Supreme Court rendered a judgment reversing the rulings of the trial court. Each of the defendants say that the rulings of the Supreme Court of Georgia are questions of law and the judgment as rendered therein speaks for itself.

(20) In answer to paragraph 22 of the petition each of said defendants deny said paragraph. Each of said defendants say that prior to the passage or adoption of any of the claimed ordinances and prior to the special paving assessment, and prior to the issuing of the fi. fa. in question, the Georgia Railway & Electric Company and the Georgia Railway & Power Company notified the plaintiff that the [fol. 31] special paving assessment as contemplated would vastly exceed the entire value of the street railway lines located and being operated within the territorial limits of plaintiff, taking into consideration all improvements which in any way resulted or could result from the street paved and offered to surrender to the plaintiff its street railway lines and franchises therein without the necessity of any levy or sale thereof and tendered to plaintiff the entire line located within the municipality of Decatur, together with the franchise to construct and operate the same, but the same was refused by the plaintiff. Continuous since said time defendants have made a continuing tender of said street railway lines located in the territorial limits of Decatur, together with the franchise under which they were constructed and operated in payment or satisfaction

of the paving assessment in question, and now and here tender and makes a continuing tender of the same. Each of said defendants say that under said tender and continuing tender there is and can be no necessity for the plaintiff to levy upon the tracks of the street railway lines located in Decatur and by virtue of said tender and continuing tender plaintiff cannot claim any rights under the allegations as set out in paragraph 22 of the petition. Defendants assert that the only reason plaintiff will not accept the entire street railway lines located within the limits of plaintiff, together with the franchise, in payment of the special paving assessment in question, is because the entire value of said line and franchise is less than the said claimed special paving assessment.

(21) In answer to paragraph 23 of the petition each of said defendants deny said allegations. Defendants say that as set out and alleged in the preceding paragraph of this answer, and as hereinafter set out, the defendants have never made any contention that plaintiff cannot levy upon [fol. 32] the street railway lines and franchises in Decatur but have tendered and makes a continual tender of the line and franchise to the plaintiff.

(22) Each of said defendants deny the allegations of paragraphs 23, 24 and 25 of the petition.

(23) The plaintiff in enacting the claimed ordinances, and in making the claimed special paving assessment and in issuing the fi. fa. in question are proceeding under and by virtue of the acts of the legislature of the State of Georgia, Acts 1919, page 834, et seq. and the Acts of the Legislature of the State of Georgia approved August 12, 1924, Georgia Laws 1924, page 534; the same being amendments of the charter of the plaintiff. Each of the defendants say that if said acts and said ordinances and said fi. fa. be so construed as to allow the plaintiff the relief prayed for in this suit that then the said Acts of 1919 and the said Acts of 1924 and the said ordinances with reference to the special paving assessment against any of the said defendants and the said special paving assessment against any of said defendants, are illegal and void and unconstitutional and violative of the State and Federal constitutional provisions hereinafter set out.

(24) Georgia constitutional provision Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553, provides: "All taxes shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." If it be held that the said Acts of 1919 and 1924 of the legislature of the State of Georgia permit the City of Decatur, to recover a personal judgment against any of the defendants for the special paving assessment in question, or if it be held that said acts permit plaintiff to make the [fol. 33] special paving assessment a personal liability upon any of the defendants sued, that then the said acts and said ordinances or special paving assessment based or made thereunder as thus construed, are void and unconstitutional in that they are in conflict with the said constitutional provisions; for that the said acts and the said municipal ordinances and the said special paving assessment, as thus construed, would permit plaintiff to have a personal liability or judgment against said defendants for the amount of the special paving assessment in violation of the constitutional provision of the State of Georgia and would deny to each of the defendants equality and uniformity of taxation as therein guaranteed, for it is the general rule of law that a special paving assessment cannot be imposed as taxes under said constitutional provision and can not be made the basis of a personal liability against a property owner. Defendants further say that said Acts of 1919 and 1924 are special laws and that the said Georgia constitutional provisions, (as codified in Georgia Code Section 6553) require taxes to be levied under general laws. Defendants say that the special paving assessment in question, if construed to be a tax against said defendants, violates said constitutional provisions, for the reason that it is not sought to be levied against said defendants under general laws. Defendants say if said Acts of 1919 and 1924 are construed by the court as permitting a personal liability against any of said defendants for the said special paving assessment in question, that such construction of said acts render- said acts and said ordinances based under and by virtue of said acts unconstitutional and violative of Georgia constitutional provisions as set out in Georgia Code Section- 6358 and 6359 and are violative of the 14th amendment

of the Constitution of the United States, for such construction would deprive said defendants of the equal protection [fol. 34] of the law as therein provided; would unconstitutionally discriminate against each of said defendants and would deprive each of said defendants of their property without due process of law.

(25) Defendants say that in construing the laws of the State of Georgia and in holding that special paving assessments do not fall under the class of taxation as referred to in Georgia constitutional provisions codified in Section 6553 it is held that under the laws of the State of Georgia special paving assessments can only be sustained on the basis of benefits accruing to particular property affected thereby and that such special paving assessments are and can be imposed only upon the property benefited, and that execution therefor can not be a personal liability against the property owner and cannot run generally against other property of the property owner but can only run against the particular property effected and benefited by the improvement.

(26) Defendants show to the court the following state of facts:

Before the passage of any special paving ordinance by the plaintiff, two of the defendants, being separate and distinct corporations, to wit, the Georgia Railway & Electric Company and the Georgia Railway & Power Company, hearing that the municipality of Decatur might pave a portion of Ponce de Leon Avenue along which street railway tracks were laid and a line was being operated, notified the plaintiff that the street railway lines in Decatur were being operated at a loss and that the contemplated paving assessment if made against the street railway company or its property would greatly exceed the entire value of the street railway property located along Ponce de Leon Avenue and would entirely exceed the value of the street railway lines located within the municipal limits of Decatur. At said time the Georgia Railway & Power Com- [fol. 35] pany was the lessee and the Georgia Railway & Electric Company was the owner of said line and franchise in Decatur, and each of said parties offered to cease operation of its street railway lines in Decatur and surrender to plaintiff the entire street railway lines and property

constructed and operated thereunder, together with the franchise under and by virtue of which they were constructed and being operated. That prior to the passage of any ordinance defendants notified the plaintiff that if it constructed paving on Ponce de Leon Avenue and sought to make as assessment against either of said companies or their property that the costs of the same would vastly exceed the entire value of the street railway property located and being operated within the territorial limits of plaintiff taking into consideration all improvements of whatever kind or character might be made by virtue of the street improvement. That in addition to said notification the Georgia Railway & Electric Company, the lessor, and owner of the street railway lines in Decatur, and the Georgia Railway & Power Company the lessee and operator of the street railway lines, by proper corporate action, gave notice to the plaintiff that it would surrender all of its franchise rights therein, but the plaintiff took action to compel further and continued operation of the said street railway lines in Decatur.

Defendants say that the plaintiff passed an ordinance to pave a part of Ponce de Leon Avenue and to make a special paving assessment "against the Georgia Railway & Power Company for the total costs of paving between the tracks of said company and for two feet on each side thereof." That thereafter a fi. fa. was issued against the Georgia Railway & Power Company. No ordinance or assessment was ever made against the Georgia Railway & Electric Company and no fi. fa. has been issued against said company or any of its property. The street railway [fol. 36] lines along Ponce de Leon Avenue (the street paved) had been constructed by virtue of a franchise granted by the City of Decatur to the Collins Park & Belt Railroad Company. The said franchise and the street railway lines in Decatur became the property of the Georgia Railway & Electric Company and a municipal franchise from the City of Decatur to said company with reference to said line provided that no higher rate of fare than 5 cents per passenger could be charged on said line during its operation. Defendants show that the amount of the special paving assessment in question was and is more than the value of the entire street railway lines located and operated within the territorial limits of Decatur, including

the franchise under and by virtue of which said line was constructed and being operated. With the street paving and the street paving improvement the street railway lines, within the territorial limits of Decatur and the franchise under which the same were constructed and operated, were and are not worth the amount of the special paving assessment in question and the special paving fi. fa. The street railway line and the franchise under which it is constructed and being operated within the territorial limits of Decatur were and are not worth anything to the balance of the street railway line or system outside of Decatur. The paving, for which the street paving assessment in question was made, did not, does not and cannot benefit the portion of the street railway lines located within the territorial limits of Decatur. The street paving did not add anything to the physical property or franchise of the defendants or any of them. It was a detriment to the physical property and to the portion of the street railway line. The paving did not add anything to traffic. The street railway lines of defendants and the franchise under which it was constructed and operated were not and are not worth the [fol. 37] amount of the special paving assessment in question. Defendants make a tender and a continuing tender of the entire street railway lines located within the territorial limits of Decatur, together with the franchise under which it was constructed, and being operated in payment or satisfaction of the special paving assessment in question.

(27) Each of said defendants say that the present suit is an undertaking on the part of the plaintiff to recover the amount of said special paving assessment against the defendants and each of them, although none of the defendants and none of the defendants' property received any benefits from the street improvement or the paving of said street.

(28) Each of said defendants say that the present suit is an undertaking on the part of the plaintiff to recover a personal judgment against each of said defendants under and by virtue of a claimed special paving assessment made under the Acts of the Georgia legislature of August 12, 1924 (Georgia Laws 1924, page 534 et seq.) Defendants say that said law, if properly construed, does not permit a personal liability or judgment to be issued against

said defendants as is attempted in the present suit. Each of said defendants say that under the facts, as just heretofore set out, plaintiff is not entitled to a personal liability or judgment against any of said defendants for said special paving assessment as attempted in said suit. The law of the State of Georgia, as repeatedly announced by the highest court of this State, is that special paving assessments are and must be imposed on property and cannot be made a personal liability or the basis for obtaining a personal judgment against the property owner. Each of said defendants say that said acts of 1924 (Georgia Laws 1924, page 534 et seq.) and the charter amendment provisions of plaintiff, if properly construed, do not create a personal [fol. 38] liability against defendants, or any of them, for the special paving assessment in question and does not authorize plaintiff to have a personal judgment rendered against any of said defendants for said special paving assessment as is attempted in the instant suit.

Each of said defendant- says that if this court should so construe the provisions of the Acts of 1919 page 934 et seq. and the Acts of August 12, 1924 (Georgia Laws 1924, page 534 et seq.) as creating a personal liability against the defendants or any of them, for the special paving assessment in question, or if this court should construe the ordinances as passed by the plaintiff and the special assessment as made thereunder as authorizing such personal liability for the special paving assessment in question, then the said acts and said ordinances as thus construed are void and unconstitutional in that they are discriminatory against each of said defendants and deny to each of said defendants the equal protection of the law and the due process of law as guaranteed by the Constitution of the State of Georgia as codified in Georgia Code Sections 6359 and 6359, and as guaranteed in the 14th amendment of the Constitution of the United States.

(29) Defendants say that as heretofore set out there is an entire absence of benefit to said defendants or their property from the paving in question. Defendants further show that the special paving assessment sought to be assessed against each of said defendants unconstitutionally confiscates the property of said defendants, for that the costs of said special paving assessment is substantially in

excess of any special benefits which have accrued or can accrue to any of said defendants or any of said defendant's property wherever located, and the special paving assessment in question so far exceeds any benefit of any kind or character which defendants, or defendants' property, can [fol. 39] receive from the paving, so as to make said special paving assessment unjust and confiscation of the property of the defendants in violation of the 14th amendment of the Constitution of the United States.

(30) Defendants show that without special benefits special paving assessments (not exacted under general taxation and under general laws as provided for in Georgia constitutional provisions codified in Georgia Code Section 6553) are unconstitutional and cannot be sustained and are likewise unconstitutional and cannot be sustained when the assessment is arbitrary and unreasonable in amount or the amount of the assessment exceeds the benefits. That in such cases said special paving assessments are violative of the 14th amendment of the Constitution of the United States. Each of said defendants separately allege that in the instant case the amount of the special paving assessment in question is excessive and unreasonable and arbitrary in amount; that it exceeds the special benefits received by any of the defendants or any of the defendants' property, and defendants' property receives no special benefit from the paving improvement.

(31) Defendants say that if under the facts set out in this answer the court construes the provisions of the Act of 1919, page 934, et seq. and the provisions of the Act of 1924, approved August 12, 1924, page 534 et seq. and construe the special assessment ordinance in question as permitting the collection of the special paving assessment against the defendant, or any of them, and as permitting a personal judgment against the defendants, or any of them, that then said acts and said ordinances and each of them, as thus construed, are unconstitutional and void in violation of the equal protection of the law and the due process of law as guaranteed under the 14th amendment of the Constitution of the United States and that if such construc- [fol. 40] tion is placed upon said acts and said ordinances that said acts and said ordinances confiscate the property of the defendants and each of them, and is unreasonably

discriminatory against each of them in contravention of the 14th amendment of the Constitution of the United States and deprives each of said defendants of the due process of law as therein guaranteed for the following additional reasons:

(a) For that said acts and said ordinances thus construed would place a special paving assessment, as a personal liability, upon all the property, whether real or personal of each of said defendants, and upon all the property of each of said defendants wherever located or situated whether within or without the municipal limits of the City of Decatur. Whereas all other paving assessments under said acts and said ordinances are limited not only to real property within the municipal limits of Decatur, but to real property lying along or adjacent to the street being improved and paved.

(b) Said acts and said ordinances as thus construed would subject each of the defendants to a personal liability for a special paving assessment and would authorize a general judgment against each of said defendants thus creating a lien upon all the property of each of said defendants and all the property of the Georgia Railway & Electric Company and all the property of the Georgia Railway & Power Company, both real and personal located anywhere within the municipal limits of Decatur, without regard as to whether said property is situated in a- area or along the street being paved or improved; whereas all other paving assessments are limited to the property within the area being improved and adjacent to or along the street being paved. The same is also true to all property, both real and personal, of the Georgia Power Company.

[fol. 41] (c) Said acts and ordinances as thus construed would authorize a general personal judgment and place a special paving assessment upon all the property of each of said defendants whether real or personal not only located anywhere within the municipal limits of the City of Decatur, but located anywhere without said limits and without regard to whether said property is situated in the area or along the street being paved or improved or whether said property was or could in any way be benefited by said improvement, whereas all other paving assessments do not permit a personal judgment of any kind or character but

is limited not only to real property within the limits of the municipality of Decatur but to real property benefited and to real property adjacent to or along the street being paved or improved.

(d) Said acts and said ordinances as thus construed would place a paving assessment against all of the street railway property of each of said defendants whether real or personal, situated and located anywhere within or without the limits of Decatur without regard to benefits; whereas the paving assessment against all other property is solely against real property benefited and located within the area being improved and adjacent to the street being paved or improved.

(e) Said acts and said ordinances as thus construed would place a special paving assessment and allow the plaintiff to have a lien upon all street railway property of the defendants located anywhere within the municipal limits of Decatur without regard to any special benefit received by defendants or any of them to their property located within the municipal limits of Decatur; whereas the special paving assessment and lien against all other property are limited to special benefits received by such real property within the area being improved and to such [fol. 42] real property as lies along and adjacent to the street being improved.

(f) Said acts and said ordinances as thus construed would not limit the special paving assessment and lien against the defendants, or any of them, to benefits received either to defendants real or personal property located within the municipal limits of Decatur; whereas the special paving assessment and lien against all other property are limited to special benefits to real estate located within the municipal limits of Decatur, and within the limits of the area being improved and adjacent to and along the street being paved or improved.

(g) Said acts and said ordinances thus construed would not limit the special paving assessment in question to benefits or to the amount of benefits received by the street railway property, real or personal, located within or without the territorial limits of the municipal of Decatur; whereas

the special paving assessments against all other property owners is limited to benefit received by real property within the municipal limits of Decatur and within the area being improved and adjacent to and located upon the street being paved or improved:

(h) Said acts and said ordinances as thus construed would confiscate the property of defendants and each of them, for that under the facts in the instant case the special paving assessment would not be limited to benefits or to amount of benefits received by defendants, or any of them. Each of the defendants allege that its property and the property of the other defendants receive no benefits from the special paving assessment in question; and further allege that neither of said defendants nor defendants' property receive any benefits from the special paving assessment in question equal to or commensurate with the special paving assessment, and this is irrespective of whether the question of benefits be confined to the limits of Decatur [fol. 43] or to the defendants or to the property of any of the defendants located outside of said territorial limits of Decatur.

Defendants allege that the property of the street railway company, whether real or personal, within the limits of Decatur, receive no benefits from the street paving improvement and further allege that none of said companies, nor the property of said companies, within the limits of Decatur receive a benefit equal to or commensurate with the amount of said assessment.

Defendants say that none of the defendants nor their property within the area improved received any benefits from the street paving and further allege that the said property did not receive any benefits equal to or commensurate with the amount equal to said paving assessment.

Each of said defendants further allege that the special paving assessment unconstitutionally confiscates the property of each of said defendants, for the reason that the amount of said special paving assessment greatly exceeds any benefits received or that can be received by the defendants or any of them, and that the amount of said special paving assessment is so disproportioned to the benefits which defendants or any of them did or could receive from said street improvement that the said special paving as-

sessment amounts to an unconstitutional confiscation of the property of each of said defendants.

(i) Defendants say that if said acts and said ordinances are construed by the court as sustaining the special paving assessment in question and as establishing benefits and as depriving the defendants of the right to show that the property of defendants have received no benefits from the improvements equal or commensurate with the amount of the assessment then said acts and assessment ordinances [fol. 44] as thus construed, deprive each of said defendants of due process of law in that it denies to each of said defendants a hearing with reference to benefits, as compared to the special paving assessment in question. Each of said defendants claim that under the facts said assessment so far exceeds any special benefits as to render said assessment unreasonable and confiscatory.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Defendants.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDED PLEA AND ANSWER—Filed June 20, 1933

And now comes Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, and by leave of court first had and obtained, each of said corporations files the following amended plea and answer as a separate amended plea and answer, in the above named suit.

1. Defendants, and each of them separately, say that if the statutory method as set out in the charter of petitioner is held to be constitutional and does not violate the various constitutional provisions as set out and insisted upon in its plea and answer heretofore filed, that then said statutory method as set out in petitioner's charter is exclusive and that neither a court of equity nor a court of law can enlarge or extend the method as provided for in the legislative

[fol. 45] acts giving charter power to petitioner, for that the said legislative act and charter powers with reference to the making of special paving assessments and with reference to the method and manner of their collection are exhaustive of petitioner's rights and remedies.

2. Defendants, and each of them separately, say that the constitution of the State of Georgia, Code Section 6379, provides:

"The legislative, judicial, and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided."

There is no exception to said constitutional provision in the Constitution of the State of Georgia or in any legislative act of the State of Georgia authorizing a court of law or a court of equity to levy or to assess or to collect the special paving assessment in question. There is no statutory provision authorizing petitioner to collect the paving assessment in question in any other method or manner than that specifically set out and provided for in the legislative acts creating petitioner and the various legislative acts amending petitioner's charter, and there is no statutory act giving petitioner any right, power or authority to collect the special paving assessment in question by either a suit at law or suit in equity. Under said constitutional provision legislative power is not conferred upon the judiciary and the judiciary is prohibited from exercising legislative power while sitting either as a court of law or as a court of equity.

Neither a court of law nor a court of equity has any right, power or authority to provide for special paving [fol. 46] assessment or taxes or to provide for special assessments or for the manner and method of collecting special assessments or taxes other than in the method and manner as enacted by the legislature of the State of Georgia. No such legislative power or authority has been conferred by any legislative act upon either a court of law or a court of equity, and neither of said courts can legislate a remedy either for the assessment or collection of the paving assessment in question other than that provided for by

the legislature of the State of Georgia. That under and by virtue of the Constitution of the State of Georgia, Code Section 6379, neither a court of law nor a court of equity can supply any additional remedy for the assessment or method and manner of collection of the paving assessment in question other than that provided for by the legislature of the State of Georgia.

3. Defendants, and each of them separately, say that the only assessment made in the case at bar was a special paving assessment against the Georgia Railway & Power Company. No special paving assessment was made either against the Georgia Railway and Electric Company or the property of the Georgia Railway & Electric Company, or against the Georgia Power Company or the property of the Georgia Power Company. No special paving assessment was made against any claimed lease-hold interest of the Georgia Railway & Power Company and no court of law or equity has any power or authority to make any special paving assessment for that no such power or authority has been conferred upon either of said courts by the legislature of the State of Georgia.

4. Defendants, and each of them separately, say that if the suit at bar be construed as a suit having for its purpose the collection of a special paving assessment and obtaining a general judgment against each or all of the defendants [fol. 47] sued, that then said suit is barred by the statute of limitations as to each of said defendants, and each of said defendants separately plead the statute of limitations.

Defendants, and each of them separately, say that the suit in question is not a suit seeking to enforce any lien against any property or any specific property and is not a suit to reach any trust funds, but is merely an undertaking on the part of the petitioner to collect a certain amount of money from each of said defendants. That the claimed amount for which a judgment is sought against each of said defendants is not evidenced by any contract in writing or founded upon any contract in writing. That under and by virtue of Code Section 4362 of the State of Georgia all actions upon open account or for a breach of any contract not under the hand of the party sought to be charged or upon any implied assumpsit or undertaking, shall be brought within four years after the right of action accrues.

That, Section 4368 provides that all other actions upon contracts expressed or implied, not hereinbefore provided for must be brought within four years of the accrual of the right of action.

Each of said defendants say that under the satutory law of the State of Georgia the cause of action sought to be set out against it is barred by said statutory enactments and is barred by the statute of limitations of the State of Georgia applicable to the cause of action as sought to be set out against each of the defendants sued.

Georgia Code Section 4372 provides: "Any claim or demand held by any municipality, not being in the shape of a special contract, or which has not been reduced to execution shall be barred by the statutes of limitation as provided by the general statutes of limitation of force in this State, and all executions issued by any municipality shall [fol. 48] be subject to the same laws as to the statutes of limitation now governing other executions."

Each of the defendants say that if the suit in question is held to be a claim or demand held by the municipality and not in the shape of a special contract that then, construing said action as undertaking to recover a money demand against the defendants, (and if such action can be maintained, which defendants deny) the action is barred by the statutes of limitation. Each of the defendants say that however said cause of action may be construed, that in so far as it undertakes to recover a mere money demand or judgment against the defendants, or any of them, that the same is barred by the statutes of limitation.

Colquitt, Parker, Troutman & Arkwright, Attorneys for defendants.

STATE OF GEORGIA,
Fulton County:

Personally appeared before the undersigned, P. S. Arkwright, who on oath says that he is president of the Georgia Power Company, and says that at the time of filing the original plea and answer in the instant case the facts or defenses herein set out were not omitted for the purpose of delay and that this amendment is not now offered for delay.

P. S. Arkwright.

Sworn to and subscribed before me this 19th day of June, 1933. Ruby Bowden, Notary Public, Georgia, State at Large. My commission expires March 1, 1937. (Seal of N. P.)

[File endorsement omitted.]

[fol. 49] Allowed and ordered filed as part of the record in said case—subject to demurrer.

This June 20th, 1933.

G. H. Howard, Judge S. C. A. C.

In Superior Court of Fulton County

[Title omitted]

Motion to Dismiss the Petition—Filed March 31, 1933

And now comes the Georgia Railway & Electric Company, one of the defendants in the above stated case, and moves to dismiss the petition filed in said case and demurs to the petition filed in said case, upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make [fol. 50] this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to

maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, section 2, paragraph 1, (Code Section 6553) of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provisions for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessments, executions issued therefor do not run generally against the owner of the property, [fol. 51] and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plain-

tiff is claiming to act under and by virtue of the acts of the legislature of the State of Georgia; Acts 1919, page 834, et seq., and the Acts of the legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534, (the same being amendments to the charter of the plaintiff) then defendant says that said act, and amendments does not give the plaintiff the right to collect said fi. fa. or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553, for that the said act, as thus construed will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing [fol. 52] said act or acts would be in contravention and in conflict with the said provision of the Georgia constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of the law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special pavement assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said Acts of 1919 and 1924 are construed by the court as permitting a recovery of a personal liability against this defendant for the special paving assessment in question, then such construction of

said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

[fol. 53] Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7 Section 2, Paragraph 1 (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Wherefore, defendant prays that the petition be dismissed.

Colquitt, Parker, Troutman & Arkwright, Attorneys for defendant.

[fol. 54] Copy of the within and foregoing demurrer and motion to dismiss received. Service acknowledged, and all

other and further service hereby waived. This 28 day of March, 1933.

Branch & Howard, Attys. for Plaintiff.

[File endorsement omitted.]

After argument the within motion is hereby overruled. This March 31, 1933.

E. D. Thomas, Judge S. C. A. C.

In Superior Court of Fulton County

[Title omitted]

Motion to Dismiss the Petition—Filed March 31, 1933

And now comes the Georgia Power Company, one of the defendants in the above stated case, and moves to dismiss the petition filed in said case and demurs to the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a [fol. 55] personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessments in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the City the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxaton as provided for in said constitutional provision.

[fol. 56] 7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the Acts of the legislature of the State of Georgia, Acts 1919, page 834, et seq., and the Acts of the legislature of the State of Georgia,

approved August 12, 1924, Georgia Laws 1924, page 534 (the same being amendments to the charter of the plaintiff) then defendant says that said act, and amendments, does not give the plaintiff the right to collect said fi. fa. or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus [fol. 57] construed, would be illegal, void and unconstitutional, and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553, for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment, and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said Act of 1919 and 1924 are construed by the court as permitting a recovery of a personal liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitu- [fol. 58] tional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that

said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2 and Paragraph 1 (Code Section 6553 of the State of Georgia) and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided for that the law of this State as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

[fol. 59] Wherefore, defendant prays that said petition be dismissed.

Colquitt, Parker, Troutman & Arkwright, Attorneys for defendant.

[File endorsement omitted.]

After argument the within motion is hereby overruled. This March 31, 1933.

E. D. Thomas, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

MOTION TO DISMISS THE PETITION—Filed March 31, 1933

And now comes the Georgia Railway & Power Company one of the defendants in the above stated case, and moves to dismiss the petition filed in said case and demurs to the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment [fol. 60] rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant of giving the petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, of Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on

all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provison.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State [fol. 61] only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the acts of the legislature of the State of Georgia, Acts 1919, page 834, et seq., and the acts of the legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534, (the same being amendments to the charter of the plaintiff) then defendant says that said act, and amendments, does not give the plaintiff the right to collect said fi. fa. or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, codified in Georgia Code Sec-

tion 6553, for that the said act, as thus construed, will per-
[fol. 62] mit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia ocnstitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the constitution of the United States.

10. Defendant says that if said acts of 1919 and 1924 are construed by the court as permitting a recovery of a personal liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed there under, unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconsti-
[fol. 63] tutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this

defendant personally liable for the special paving assessment in question, then that such legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section 2 and Paragraph 1 (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Wherefore, defendant prays that this petition be dismissed.

Colquitt, Parker, Troutman & Arkwright, Attorneys for defendant.

[fol. 64] [File endorsement omitted]

After argument the within motion is hereby overruled This March 31, 1933.

E. D. Thomas, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

BILL OF EXCEPTIONS PENDENTE LITE—Filed April 10, 1933

STATE OF GEORGIA,
Fulton County:

Be it remembered that on the 31st day of March, 1933, before the Honorable E. D. Thomas, Judge of the superior

court, of Fulton County presiding, there came on to be heard the case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action to recover a judgment against each one of the said named defendants to collect a certain special paving assessment.

The Georgia Railway & Electric Company, one of the defendants in the above stated case, moved to dismiss the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

[fol. 65] 3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to make this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7 Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem

on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provisions for equality and uniformity of taxation as provided for in said constitutional provision.

[fol. 66] 7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessment, and to allow a personal general judgment against this defendant, under the facts set out in this case would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the acts of the legislature of the State of Georgia, Acts 1919, page 834, et seq. and the acts of the legislature of the State of Georgia approved August 12, 1924, Georgia Laws, 1924, page 534 (the same being amendments to the charter of the plaintiff) then defendant says that said act and amendments does not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, [fol. 67] as thus construed, would be illegal, void and un-

constitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553 for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said Act of 1919 and 1924 are construed by the court as permitting a recovery of a personal judgment or liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia [fol. 68] Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or acts of the State of Georgia be construed as permitting petitioner to obtain a

personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such legislative act or acts as thus construed would render said acts illegal, void and unconstitutional as violative of Article 7, Section and Paragraph 1 (Code Section 6553 of the State of Georgia) and said acts as thus construed would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided; for that the law of this State, as construed by the Supreme Court of the States, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

[fol. 69] 11. Defendant further moved to dismiss said suit upon the ground that the petition in said case does not allege or claim that defendant received any benefit from the paving assessment in question, and that the paving assessment sought to be enforced against this defendant is not based or predicated upon any claim of benefits, there being no allegation or contention of benefits, and the said paving assessment not being based or predicated upon any claim of benefits and said suit not claiming or alleging any benefits to defendant, defendant moved to dismiss said suit upon the ground that the paving assessment and the ordinance in question are illegal, invalid and unconstitutional and violative of the 14th amendment to the constitution of the United States, for that said assessment and said paving ordinance, there being no contention or allegation with reference to benefits, confiscates the property of the defendant and denies it the due process of law and the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Defendant further moved to dismiss said petition for the reason that all other paving assessments, under the ordinance in question, and under the laws of the State of Georgia, are based upon claimed benefits and the foundation of such assessment is predicated upon benefits, and that to base such paving assessment against other property upon the claim of benefits and to base said paving assessment against this defendant without any claim of benefits, and not upon any contention or claim of benefits, would deny to defendant the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, and for this reason would render said assessment illegal, invalid and unconstitutional.

[fol. 70] Defendant further says that under the laws of the State of Georgia all other special paving assessments made against other property is not a personal liability against the owner of such other property and can only be enforced against the property benefited and that to contrue the charter amendment of the City of Decatur, heretofore set out, as holding that no personal liability can be rendered against the owners of such other property, but to hold that a personal liability can be enforced against this defendant would render said statute, as thus construed, unconstitutional for that it would deprive this defendant of the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, for the said statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The court passed an order upon said motion of this dedendant and overruled each and every ground of said motion. The said order as rendered by the court being as follows:

"After argument the within motion is hereby overruled. This March 31, 1933. E. D. Thomas, Judge S. C. A. C."

To said ruling of the court the defendant, Georgia Railway & Electric Company, then excepted and now excepts and says that the court erred in not sustaining each and every one of the grounds of its motion to dismiss said petition, and says that the court erred in overruling each

and every one of its said grounds of its said motion to dismiss said petition, and the Georgia Railway & Electric Company then excepted and now excepts to the said ruling of said court and then and now excepts and says that the court erred in its said holding and erred in overruling each and [fol. 71] every one of said grounds of its said motion and erred in not sustaining each and every one of said grounds of its said motion and defendant, Georgia Railway & Electric Company, assigns error upon the said ruling of the court and says that the court erred in not sustaining each and every one of the contentions of the defendant, Georgia Railway & Electric Company, as made in said motion, and erred in not dismissing said petition.

And now comes the Georgia Railway & Electric Company, within the time allowed by law and files this its bill of exceptions pendente lite, and prays that this its bill of exceptions pendente lite be certified to be true and ordered placed on the minutes and filed as a part of the record in said case.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Georgia Railway & Electric Company.

[File endorsement omitted.]

Certificate

The foregoing bill of exceptions pendente lite are hereby approved and certified to be true and to have been tendered within the time allowed by law for the filing of bill of exceptions pendente lite and the bill of exceptions pendente lite are allowed and certified to be true within 30 days from the passage of the order complained of and within the time for the tendering and certification of bill of exceptions pendente lite.

Let the said bill of exceptions pendente lite, together with this certificate, be filed as part of the record in said case and placed upon the records and minutes of the superior court of Fulton County.

This 10 day of April, 1933.

E. D. Thomas, Judge S. C. A. C.

[fol. 72] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

BILL OF EXCEPTIONS PENDENTE LITE—Filed April 10, 1933

STATE OF GEORGIA,
Fulton County:

Be it remembered that on the 31st day of March, 1933, before the Honorable E. D. Thomas, Judge of the superior court of Fulton County presiding, there came on to be heard the case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action to recover a judgment against each one of the said named defendants to collect certain special paving assessments.

The Georgia Power Company, one of the defendants in the above stated case, moved to dismiss the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle the plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is no statute or charter provision of the City of Decatur authorizing petitioner to [fol. 73] make this defendant personally — for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violate of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving a street have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do not run generally against the owner of the property, [fol. 74] and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assesments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question, the plaintiff is claiming to act under and by virtue of the acts of the legislature of the State of Georgia, Acts 1919, page 834, et seq. and the acts of the legislature of the State of

Georgia, approved August 12, 1924, Georgia Laws, 1924, page 534 (The same being amendments to the charter of the plaintiff) then defendant says that said act, and amendments, do not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia Article 7, Section 2, Paragraph 1, Codified in Georgia Code Section 6553, for that the said act, as thus construed, will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and [fol. 75] in so construing said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defendant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

10. Defendant says that if said act of 1919 and 1924 are construed by the court as permitting a recovery of a personal judgment or liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia

Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

[fol. 76] Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such legislative act or acts as thus construed would render said acts illegal, void, and unconstitutional as violative of Article 7, Section 2 and Paragraph 1 (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law as therein guaranteed and provided; for that the law of this State, as construed by the Supreme Court of the State, is that there is no personal liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the constitution of the United States.

11. Defendant further moved to dismiss said suit upon the ground that the petition in said case does not allege or claim that defendant received any benefit from the paving assessment in question, and that the paving assessment sought to be enforced against this defendant is not based or predicated upon any claim of benefits, there being no allegation or contention of benefits, and the said paving assessment not being based or predicated upon any claim of benefits and said suit not claiming or alleging any bene-

[fol. 77] fits to defendant, defendant moved to dismiss said suit upon the ground that the paving assessment and the ordinance in question are illegal, invalid and unconstitutional and violative of the 14th amendment to the constitution of the United States, for that said assessment and said paving ordinance there being no contention or allegation with reference to benefits, confiscates the property of the defendant and denies it the due process of law and the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Defendant further moved to dismiss said petition for the reason that all other paving assessments, under the ordinance in question, and under the laws of the State of Georgia are based upon claimed benefits and the foundation of such assessment is predicated upon benefits, and that to base such paving assessment against other property upon the claim of benefits and to base said paving assessment against this defendant, without any claim of benefits, and not upon any contention or claim of benefits, would deny to defendant the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, and for this reason would render said assessment illegal, invalid and unconstitutional.

Defendant further says that under the laws of the State of Georgia all other special paving assessments made against other property is not a personal liability against the owner of such other property and can only be enforced against the property benefited and that to construe the charter amendment of the City of Decatur, heretofore set out, as holding that no personal liability can be rendered against the owners of such other property, but to hold [fol. 78] that a personal liability can be enforced against this defendant would render said statute, as thus construed, unconstitutional for that it would deprive this defendant of the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, for the said statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The court passed an order upon said motion of this defendant and overruled each and every ground of said

motion. The said order as rendered by the court being as follows:

"After argument the within motion is hereby overruled. This March 31, 1933.

E. D. Thomas, Judge S. C. A. C."

To said ruling of the court the defendant, Georgia Power Company, then excepted and now excepts and says that the court erred in not sustaining each and every one of the grounds of its motion to dismiss said petition, and says that the court erred in overruling each and every one of its said grounds of its said motion to dismiss said petition, and the Georgia Power Company then excepted and now excepts to the said ruling of said court and then and now excepts and says that the court erred in its said holding and erred in overruling each and every one of said grounds of its said motion and erred in not sustaining each and every one of said grounds of its said motion and defendant, Georgia Power Company, assigns error upon said ruling of the court and says that the court erred in not sustaining each and every one of the contentions of the defendant, Georgia Power Company, as made in said motion, and erred in not dismissing said petition.

[fol. 79] And now comes the Georgia Power Company, within the time allowed by law and files this its bill of exceptions pendente lite and prays that this its bill of exceptions pendente lite be certified to be true and ordered placed on the minutes and filed as a part of the record in said case.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Georgia Power Company.

Certificate

The foregoing bill of exceptions pendente lite are hereby approved and certified to be true and to have been tendered within the time allowed by law for the filing of bill of exceptions pendente lite and the bill of exceptions pendente lite are allowed and certified to be true within 30 days from the passage of the order complained of and within the time for the tendering and certification of bill of exceptions pendente lite.

Let the said bill of exceptions pendente lite, together with this certificate, be filed as part of the record in said case and placed upon the records and minutes of the superior court of Fulton County.

This 10 day of April, 1933.

E. D. Thomas, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 80] In Superior Court of Fulton County

[Title omitted]

Bill of Exceptions Pendente Lite—Filed April 10, 1933

State of Georgia,
Fulton County:

Be it remembered that on the 31st day of March 1933, before the Honorable E. D. Thomas, Judge of the superior court of Fulton County presiding, there came on to be heard the case of City of Decatur vs. Georgia Power Company, Georgia Railway & Power Company and Georgia Railway & Electric Company, the same being an action to recover a judgment against each one of the said named defendants to collect a certain special paving assessment.

The Georgia Railway & Power Company one of the defendants in the above stated case, moved to dismiss the petition filed in said case upon the following grounds:

1. Said petition does not set out sufficient facts to entitle plaintiff to the relief sought against this defendant.

2. Under the rules and principles of law the plaintiff is not entitled to the relief sought in the case at bar.

3. Under the facts and the principles of law governing special paving assessments petitioner is not entitled to a personal judgment against this defendant or to make this defendant personally liable for the paving assessment in question and is not entitled to have a general judgment rendered against this defendant for the special paving assessment in question.

4. Defendant says there is not statute or charter provision of the City of Decatur authorizing petitioner to make

[fol. 81] this defendant personally liable for the paving assessment in question.

5. Defendant says that there are no statutes or charter powers of the City of Decatur giving the city the right to maintain said suit against this defendant or giving petitioner the right to recover a personal judgment against this defendant on account of any special paving assessment.

6. Movant and defendant says that if any of the statutes of the State of Georgia or any of the charter provisions of the City of Decatur be held as giving petitioner the right to impose a personal liability upon this defendant for and by virtue of any special paving assessment sought to be made against this defendant, then movant says that such statute or such charter provision, as thus construed, would be unconstitutional and violative of Article 7, Section 2, Paragraph 1, Code Section 6553 of the State of Georgia, for that said Code Section provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed, * * * and shall be levied under general laws. Defendant says that to impose a personal liability upon this defendant for the cost of special paving improvements would violate said constitutional provision for equality and uniformity of taxation as provided for in said constitutional provision.

7. Movant and defendant says that under the law of the State of Georgia special paving assessments are imposed on property and that paving assessments for paving of streets have been sustained by the Supreme Court of this State only because of benefit to particular property and that under such construction of the law of this State with reference to paving assessment, executions issued therefor do no- run generally against the owner of the [fol. 82] property, and that the instant suit is not authorized for it would be in contravention of the rules of law governing special paving assessments, and to allow a personal general judgment against this defendant, under the facts set out in this case, would be to abandon the theory of specific benefits which is the only basis upon which special paving assessments can be made under the laws of this State.

8. Defendant says that there is no law of the State of Georgia entitling plaintiff to collect the special paving

assessment fi. fa. in question by a suit in equity undertaking to obtain a general personal judgment against this defendant.

9. Defendant says that if by the proceedings in the present case seeking to enforce the fi. fa. in question the plaintiff in claiming to act under and by virtue of the acts of the legislature of the State of Georgia, Acts 1919, page 834 et seq., and the acts of the legislature of the State of Georgia, approved August 12, 1924, Georgia Laws 1924, page 534, (the same being amendments to the charter of the plaintiff) then defendant says that said act, and amendments, does not give the plaintiff the right to collect said fi. fa. by suit or to obtain a personal judgment against this defendant.

Defendant further says that if said act be so construed as to permit a personal liability or personal judgment to be recovered against this defendant that then said act, as thus construed, would be illegal, void and unconstitutional and violative of the Constitution of the State of Georgia, Article 7, Section 2, Paragraph 1, codified in Georgia Code Section 6553, for that the said act, as thus construed will permit plaintiff to recover a personal judgment against this defendant for a special paving assessment and will permit plaintiff to make a special paving assessment a personal liability upon this defendant, and in so construing [fol. 83] said act or acts would be in contravention and in conflict with the said provision of the Georgia Constitution and that such construction of said act would further be unconstitutional and violative of the Constitution of the State of Georgia and the Federal Constitution in that said act, as thus construed, would deny to this defendant the right to equality and uniformity of taxation not only as guaranteed to this defendant by the said Georgia Constitution (Code Section 6553) but would also be in contravention of the equal protection of law guaranteed to this defendant by the 14th amendment to the Constitution of the United States, for that special paving assessments under the laws of the State of Georgia cannot be made a personal liability upon the owner of the property benefited and to permit such special paving assessment to be made a personal liability against this defendant would deprive this defend-

ant of the equal protection of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

[fol. 84] 10. Defendant says that if said Act of 1919 and 1924 are construed by the court as permitting a recovery of a personal judgment or liability against this defendant for the special paving assessment in question, then such construction of said acts would render said acts and the ordinance passed thereunder, unconstitutional and violative of the Georgia constitutional provisions as set out in the Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that said construction would deprive said defendant of the equal protection of the law as therein provided and would unconstitutionally discriminate against this defendant and would deprive this defendant of its property without due process of law in violation of the said 14th amendment to the Constitution of the United States.

Movant says that if any statute or act of the State of Georgia be construed as permitting petitioner to obtain a personal judgment against this defendant or to hold this defendant personally liable for the special paving assessment in question then that such legislative act or acts as thus construed would render said Acts illegal, void and unconstitutional as violative of Article 7, Section 2 and Paragraph 1 (Code Section 6553 of the State of Georgia), and said acts, as thus construed, would further be unconstitutional in that they would violate the Georgia constitutional provisions as set out in Georgia Code Sections 6358 and 6359, and would also violate the 14th amendment to the Constitution of the United States for that such construction would deprive this defendant of the equal protection of the law was therein guaranteed and provided; for that the law of this state, as construed by the Supreme Court of the State, is that there is no personal [fol. 85] liability for special paving assessments, and to subject this defendant to a personal liability and a personal judgment for a special paving assessment would deprive this defendant of the equal protection of law as guaranteed to it by said State constitutional provisions and would also deprive this defendant of its property without due process of law as guaranteed to it by the 14th amendment to the Constitution of the United States.

11. Defendant further moved to dismiss said suit upon the ground that the petition in said case does not allege or claim that defendant received any benefit from the paving assessment in question, and that the paving assessment sought to be enforced against this defendant is not based or predicated upon any claim of benefits, there being no allegation or contention of benefits, and the said paving assessment not being based or predicated upon any claim of benefits and said suit not claiming or alleging any benefits to defendant, defendant moved to dismiss said suit upon the ground that the paving assessment and the ordinance in question are illegal, invalid and unconstitutional and violative of the 14th amendment to the Constitution of the United States, for that said assessment and said paving ordinance, there being no contention or allegation with reference to benefits, confiscates the property of the defendant and denies it the due process of law and the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States.

Defendant further moved to dismiss said petition for the reason that all other paving assessments, under the ordinance in question, and under the laws of the State of Georgia are based upon claimed benefits and the foundation of such assessment is predicated upon benefits, and that to base such paving assessment against other property upon the claim of benefits and to base said paving assessment against this defendant without any claim of benefits, [fol. 86] and not upon any contention or claim of benefits, would deny to defendant the equal protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, and for this reason would render said assessment illegal, invalid and unconstitutional.

Defendant further says that under the laws of the State of Georgia all other special paving assessments made against other property is not a personal liability against the owner of such other property and can only be enforced against the property benefited and that to construe the charter amendment of the City of Decatur, heretofore set out, as holding that no personal liability can be rendered against the owners of such other property, but to hold that a personal liability can be enforced against this defendant would render said statute, as thus construed, unconstitutional for that it would deprive this defendant of the equal

protection of the law as guaranteed to it by the 14th amendment to the Constitution of the United States, for the said statute, as thus construed, would render an entirely different remedy against this defendant for the collection of a special paving assessment than is allowed against all other property owners.

The court passed an order upon said motion of this defendant and overruled each and every ground of said motion. The said order as rendered by the court being as follows:

"After argument the within motion is hereby overruled. This March 31, 1933.'

E. D. Thomas, Judge S. C. A. C."

To said ruling of the court the defendant, Georgia Railway & Power Company, then excepted and now excepts and says that the court erred in not sustaining each and every one of the grounds of its motion to dismiss said petition, [fol. 87] and says that the court erred in overruling each and every one of its said grounds of its said motion to dismiss said petition, and the Georgia Railway & Power Company then excepted and now excepts to the said ruling of said court and then and now excepts and says that the court erred in its said holding and erred in overruling each and every one of said grounds of its said motion and erred in not sustaining each and every one of said grounds of its said motion and defendant, Georgia Railway & Power Company, assigns error upon the said ruling of the court and says that the court erred in not sustaining each and every one of the contentions of the defendant, Georgia Railway & Power Company, as made in said motion, and erred in not dismissing said petition.

And now comes the Georgia Railway & Power Company, within the time allowed by law and files this its bill of exceptions pendente lite and prays that this its bill of exceptions pendente lite be certified to be true and ordered placed on the minutes and filed as a part of the record in said case.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Georgia Railway & Power Company.

Certificate

The foregoing bill of exceptions pendente lite are hereby approved and certified to be true and to have been tendered within the time allowed by law for the filing of bill of exceptions pendente lite and the bill of exceptions pendente lite are allowed and certified to be true within 30 days from the passage of the order complained of and within the time for the tendering and certification of bills of exceptions pendente lite.

[fol. 88] Let the said bill of exceptions pendente lite, together with this certificate, be filed as a part of the record in said case and placed upon the records and minutes of the superior court of Fulton County.

This 10 day of April, 1933.

E. D. Thomas, Judge S. C. A. C.

[File endorsement omitted.]

In Superior Court of Fulton County

[Title omitted]

Motion for New Trial—Filed June 26, 1933

Each of the defendants in the above stated case, Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, come now at the term of court at which said verdict and judgment was rendered and within 30 days from the rendition of the same and move the court to set aside said verdict and judgment and to grant a new trial in said case upon the following grounds, to-wit:

(1) Said verdict and judgment are contrary to law.

2. Said verdict and judgment are contrary to the evidence in said case.

3. At the conclusion of the evidence in said case the plaintiff, City of Decatur, moved for the direction of a ver-
[fol. 89] dict in its favor and the court directed the verdict rendered in said case in favor of plaintiff, City of Decatur (it being stated as a fact that the verdict as rendered in said case) was a directed verdict. Each of said defendants say that the direction of said verdict by the

court in favor of the plaintiff, City of Decatur, was erroneous:

(a) For that no verdict should have been directed by the court in favor of the plaintiff in said case and the said verdict as directed in favor of the plaintiff was erroneous as a question of law and contrary to law and equity and unauthorized in law or equity.

(b) That the direction of said verdict in favor of the plaintiff was contrary to the evidence in said case, in that the evidence in said case did not demand a verdict in favor of the plaintiff in said case and the direction of said verdict by the court was contrary to law and the evidence in said case.

(4) It is stated as a fact that at the conclusion of the evidence in said case upon motion of the plaintiff, City of Decatur, the court directed a verdict in favor of the plaintiff and directed the verdict as entered in said case and each of said defendant- say that said verdict as directed by the court was erroneous, for that the same was contrary to law and the evidence in said case. Movants say that under the law, the rules and principles of equity and under the evidence in said case the court should not have directed a verdict in favor of the plaintiff but should have directed a verdict in favor of the defendants. A verdict in favor of the defendants was demanded by the law, the rules and principles of equity and the evidence in said case and the court erred in directing a verdict against the defendants and in favor of the plaintiff in said case.

[fol. 90] (5) Each of the defendants say that the court erred in not directing a verdict in its favor in said case and erred in not directing a verdict against the plaintiff, City of Decatur, for that under the law, the rules and principles of equity and the evidence in said case a verdict against the plaintiff, City of Decatur, was demanded and it was error for the court to direct the verdict as rendered in favor of the plaintiff, City of Decatur, and the verdict which the court instructed and directed the jury to find and which was found and rendered by the jury was erroneous.

Colquitt, Parker, Troutman & Arkwright, Attorneys for defendants, Georgia Railway & Electric Company, Georgia Railway & Power Company, and Georgia Power Company.

[File endorsement omitted.]

ORDER

The foregoing motion for a new trial read and considered. The facts therein stated with reference to the direction of a verdict by the court and the entering of the judgment by the court as therein stated are true. The grounds of said motion are approved. It is ordered that the said motion be filed as part of the record in said case. Let the motion be served upon the plaintiff or its attorneys. Let the plaintiff show cause before me on or before the 29th day of July, 1933, why the motion should not be granted. Let this order act as a supersedeas of said verdict and judgment until the further order of this court. In the meantime, and until the final hearing of this motion, whenever the same may be had, defendants and each of them are allowed time to amend and perfect the motion and to prepare, present for approval and have approved and file [fol. 91] a brief of the evidence in said case.

This 26th day of June, 1933.

G. H. Howard, Judge S. C. A. C.

Acknowledgment

Service of the foregoing motion for a new trial acknowledged and copy received; all other and further service waived.

This 26 day of June, 1933.

John Wesley Weeks, Mark Bolding, Branch & Howard, Attorney- for plaintiff, City of Decatur.

IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDED MOTION FOR NEW TRIAL—Filed Oct. 14, 1933

And now comes the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, defendants in the above stated case, and separately and individually move the court to grant a new trial in the above stated case and amends its motion for new trial heretofore filed in said case, and each for cause of amendment says:

1. Movant says that the verdict as directed by the court, to-wit:

"We the jury, find the issues in favor of the plaintiff, and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the [fol. 92] rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Company and Georgia Railway & Power Company for the collection of said amounts.

W. C. Bennett, Foreman.

June 21, 1933."

was erroneous, as each of the movants contend, for the following reasons and upon the following grounds:

(a) The Georgia acts, under and by virtue of which the plaintiff, City of Decatur, undertook to make the special paving assessment in question did not give the municipality the right to make any assessment against any street railway company which did not own the street railway and street railway tracks along or across which a street was to be paved, and movant says that the undisputed evidence in the case at bar shows that the tracks along and upon the street to be paved were owned at the time of said claimed paving assessment by the Georgia Railway & Electric Company and no verdict or judgment or decree was rendered against said Georgia Railway & Electric Company but that the only verdict directed and the decree entered thereon was against the Georgia Railway & Power Company and the Georgia Power Company.

(b) That no paving assessment was made against any leasehold interest of the Georgia Railway & Power Company in and to the tracks along and across which the paving for which the assessment in question was sought to be made and that it was erroneous for the court to direct a general judgment against the Georgia Railway & Power Company when said company did not own the track or tracks running along or across the street paved and that it was error for the court to direct a general verdict against the Georgia Power Company.

Movant says that the undisputed evidence shows that [fol. 93] the tracks along or across the street paved were owned by the Georgia Railway & Electric Company and

that no verdict or judgment or decree was rendered against said company, and that the Georgia Railway & Electric Company—the company against which no verdict or judgment was directed, was the only constituent company by virtue of which the first Georgia Power Company (a predecessor of the present Georgia Power Co.) acquired the street railway property located along or across the street paved, and that no assessment had been made against any leasehold interest of the Georgia Railway & Power Company in and to said street railway property.

(c) The undisputed evidence, as movant contends showed that the Georgia Railway & Power Company only had a leasehold interest in and to the street railway property and street railway tracks located in and along the street being paved, and the undisputed evidence, as movant contends, shows that no assessment had been made against said leasehold interest, and it was error for the court to direct a general, personal judgment against the Georgia Railway & Power Company, against a mere lessee.

Movant contends that a special paving assessment is a proceeding in vitum and cannot be predicated upon any contractual obligations and that it was error for the court to direct a general personal verdict and to enter a general personal judgment against the Georgia Railway & Power Company.

(d) Movants, and each of them, say that the direction of the verdict against the Georgia Power Company was erroneous for that, as movant contends, no special paving assessment had been made against the said Georgia Power Company, and as movant contends, a special paving assessment is a proceeding in invitum and is not based upon contract or upon contractual obligations; and that it was erroneous for the court to direct a general personal verdict [fol. 94] against the Georgia Power Company and to enter a general personal decree against the Georgia Power Company upon said directed verdict for that no special paving assessment had been made against said company and there was no basis upon which to direct a general personal judgment against the said Georgia Power Company.

(e) Movants and each of them contend that special paving assessment for the improvement of the street railway property is sustained in Georgia only because of benefits to the particular property against which the assessment

was made and *and* that executions issued therefor do not run generally against the other property of the owner and that it was erroneous for the court to direct a general personal verdict against the Georgia Railway & Power Company for that the direction of such verdict would made a special paving assessment run generally against said company. It was further error to direct a general personal verdict against the Georgia Railway & Power Company for that, under the undisputed evidence, the said Georgia Railway & Power Company did not own the property located in and around the street being paved but only had a leasehold interest there therein and no special paving assessment had been made against its said leasehold interest.

Movant contends that the direction of a general personal verdict against the Georgia Railway & Power Company was erroneous for that it made a special paving assessment run against all the property of the Georgia Railway & Power Company, wherever located and whether located within or without the territorial limits of the plaintiff, City of Decatur.

(f) Movants and each of them contend that special paving assessment for the improving of street railway property is sustained in Georgia only because of benefits to [fol. 95] the particular property against which the assessment was and that executions issued therefor do not run generally against other property or the other property of the owner not situated upon the street improved and receiving no benefit from the improvement.

Movant contends that it was error for the court to direct a general verdict against the Georgia Power Company for that the general personal verdict directed against the Georgia Power Company rendered the Georgia Power Company liable for a special paving assessment not made against it or its property and made the said Georgia Power Company liable for said special paving assessment without regard to where the property of the Georgia Power Company was located, whether within or without the territorial limits of the City of Decatur.

2. Each of the defendants separately say that the direction of the verdict in the case at bar was erroneous for that under the undisputed evidence in said case it was shown that the suit in question was barred by the statute

of limitations. The statute of limitations was specially pleaded by each of said defendants as a defense in said case and the defendants say that the court erred in not sustaining said statute of limitations, for as movant contends the undisputed evidence showed that the present suit was barred by the statute of limitations and that the plea of the statute of limitations was sustained, as movant contends, by the undisputed evidence. And movants and each of them say that the court erred in not sustaining the said statute of limitations and erred in directing a personal verdict against the Georgia Railway & Power Company and erred in directing a personal verdict against the Georgia Power Company, and erred in entering a personal money judgment and decree against each of said named defendants.

[fol. 96] 3. Movants and each of them say that the court erred in directing the following verdict:

"We, the jury find the issues in favor of the plaintiff and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Company and Georgia Railway & Power Company for the collection of said amounts.

W. C. Bennett, Foreman.

June 21, 1933."

Movant contends that the direction of said verdict was erroneous for the following reasons:

(a) If a suit could be maintained to recover a general personal verdict for paving assessment then movant contends that such personal verdict could be directed only for the amount of the special benefit resulting from the improvement in question, and that in the case at bar, there was no evidence showing any benefit of any kind or character to the property or to either of the defendants against whom the general personal verdict was directed and there was no basis for the direction of the verdict for the amount as directed.

Movant says that the court erred in holding that the question of benefits was not relevant or material and in directing the verdict as rendered against the Georgia Power

Company and the Georgia Railway & Power Company for movant contends that there was no evidence in said case to show that either of said companies or that the property of either of said companies received any direct or indirect benefit from the paving assessment in question. And movant contends that there was no evidence in said case [fol. 97] upon which to sustain a directed verdict for the amount rendered against each of said defendants.

(b) Movants and each of them say that the direction of a general verdict against the Georgia Power Company and the Georgia Railway & Power Company for the principal sum of $13,444.66, with interest thereon from June 21, 1926, was erroneous for that there was no evidence in said case to show any benefits derived from the special paving assessment in question by either the Georgia Railway & Power Company or the Georgia Power Company.

Movant and each of them say that the direction of a general personal verdict in the case at bar deprived each of the defendants of the equal protection of the law and the due process of law as guaranteed to them by the 14th amendment to the Constitution of the United States for that movant contends that each of them are entitled to the same constitutional protection accorded to others under the said 14th amendment to the constitution and that the general personal verdict could not be rendered against the Georgia Railway & Power Company and the Georgia Power Company for an amount in excess of the special benefits received by each of said companies or the property of each of said companies for the improvement or paving in question; and movant contends that there was no contention and no evidence to show that either of said companies or the property of either of said companies received any benefit whatever from the street improvement in question. And movant says that the verdict as directed was far in excess of any special benefits of any kind or character accruing to either the Georgia Railway & Power Company or the Georgia Power Company, or the property of either of said companies by virtue of the improvement or paving in question.

[fol. 98] (c) Movants and each of them say that the said verdict, as rendered by the jury, was erroneous and the decree entered thereon was erroneous for that the mode

and method of collecting said special paving assessment as provided by the charter of the plaintiff (City of Decatur) was exclusive and that there was no provision in the charter of the City of Decatur or in the general law of the State of Georgia authorizing the rendition of a personal judgment against any one of the defendants or movants, and that the direction of a general personal money judgment and the rendition of said money judgment and the decree thereon was erroneous in that there was no statutory provision authorizing the rendition of a personal money judgment against any of the movants and the said verdict as directed and said verdict as rendered, and the judgment thereon, was erroneous as a matter of law.

4. Movants and each of them say that the verdict as directed and rendered in said case and the decree as entered thereon was erroneous as a matter of law, for that the mode and method provided in the charter of the City of Decatur for the collection of the special paving assessment in question is exhaustive and exclusive and there is no statutory law or statute in Georgia giving the plaintiff the right by either common law or equitable remedy to obtain a personal money verdict and judgment against movants or any of them for a personal judgment or recovery of the special paving assessment in question.

(a) Movants and each of them say that the statutory remedy for the collection of the special paving assessment in question is exclusive and does not warrant the direction or the rendition of any special money judgment against movants or any of them and that for said reason said verdict and said verdict as directed and rendered was erro- [fol. 99] neous as a matter of law and the decree entered thereon was erroneous as a matter of law.

(b) Movants and each of them say that said verdict and decree was erroneous for there was not only no statutory provision authorizing the rendition of a personal money judgment against movants or any of them, but there was no ordinance of the City of Decatur authorizing a proceeding to obtain any personal suit or to obtain any personal judgment against movants or any of them; and that said verdict as rendered and the decree thereon was erroneous for that it was not in accordance with any statutory law of the State of Georgia or in accordance with any ordi-

nance or ordinances claimed to have been enacted by the City of Decatur.

5. Movants say that the court not only directed the jury to find in favor of the plaintiff in the amount of $13,444.66 but also directed the jury to find interest upon said amount "from June 21, 1926 at the rate of 7 per cent. per annum represented by the fi. fa. set out in the petition and that the jury following the direction of said court rendered a verdict for interest upon said amount" (To wit, $13,444.66) from June 21, 1926 at the rate of 7 per cent. per annum represented by the fi. fa.

Movants and each of them say that the rendition of said verdict, as directed and rendered, and the decree in conformance therewith finding interest upon said amount as above set out, was erroneous:

(a) For the reason that the plaintiff in said case was not following any statutory method or methods provided for the levy, assessment or collection of said special assessment. Movants and each of them say that the rendition of any verdict against movants or any of them for interest upon any claimed indebtedness for special paving assess- [fol. 100] ment was erroneous for that taxes or special assessments are not debts so as to render any interest due upon the same, and that the plaintiff, City of Decatur, was not entitled to recover any interest upon any claimed tax or special assessment, and movants and each of them say that it was error for the court to instruct the jury to find interest at 7 per cent. upon said amount from June 21, 1926, and it was error for the jury to find said interest as a part of the verdict rendered in said case and it was error to enter a judgment or decree covering said interest.

Movants and each of them contend that under the law of the State of Georgia said special assessment is not a debt and cannot be made the basis of any recovery for interest and that the direction of a verdict for interest and the rendition of a verdict for interest was erroneous as a matter of law.

(b) Movants and each of them say that there was no evidence in said case upon which to base any claim for interest. Movants and each of them (while denying the right of any personal judgment against any of them for the special paving assessment in question) specially say that a

verdict finding interest was erroneous for that special paving assessment cannot exceed special benefits either to the property or to the parties sought to be made liable therefor and that there was no evidence in said case to show the amount of special benefit to any of the property of any of the movants and there was no evidence to show any special benefit to any of the defendants or movants; and movants contend that it was error for the court to direct and for the jury to find a verdict for any interest in said case for the reason that there was no evidence in said case upon which to find any such verdict.

[fol. 101] 6. Because the court erred, as movants and each of them contend, in admitting over the objection of movants a certified copy of the annual tax return of the Georgia Railway & Power Company, lessee of the Georgia Railway & Electric Company, made on Jan. 1, 1925, to the Comptroller General of the State of Georgia, as follows:

"Annual Return for Taxation

On the Georgia Railway & Power Company, Lessee, Georgia Railway & Electric Company Street Railroad Company of all property owned by said company on the January 1, 1925, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said Company:

[fol. 102]

Cities or towns	Main and side track, miles	Value	Value of real estate	Trolley wires and poles and electric overhead and underground construction and steam heat and gas mains	Value of track and real estate	Value of franchise	Pro rata value personal property	Aggregate value in county
Decatur.....	6.2	81,471	4,500	36,311	122,282	100,699	32,948	255,929

[fol. 103] Movants and each of them at the time the same was offered objected to the same on the following grounds:

(a) That it was entirely irrelevant and immaterial. That it could have no bearing upon the issues or questions involved in said case.

(b) Movants and each of them objected to said evidence and to the portion of said tax return at the time the same was offered, to wit, "value of Real Estate, $4,500." for the reason that the said evidence was irrelevant and immaterial; that it was not contended that the special assessment in question was made against any particular real estate and it is not shown where said real estate was located, and that the return with reference thereto was irrelevant and immaterial.

(c) Movants and each of them specially and separately objected to the item, "Trolley Wires and Poles and Electric Overhead and Underground construction & steam heat & gas mains, $36,311." for the reason that the said portion of said return was irrelevant and immaterial.

(d) Movants and each of them specially objected to the portion of said return, to wit "Pro-rata Value Personal Property, $32,948." for the reason that same was irrelevant and immaterial.

(e) Movants and each of them specially and separately objected to the item, "Value of Franchise, $100,699." in the annual tax return, as being irrelevant and immaterial.

At the time the same was offered, movants objected to said portion of said evidence herein set out as being irrelevant and immaterial and upon the further ground that the franchise of the street railway company and the entire franchise, together with all the property of the street railway company, used in street railway operation, was tendered to the plaintiff in payment of the assessment in ques-
[fol. 104] tion and that the assessed value thereof or the amount returned for taxes in the "Annual Return for Taxation" of the Georgia Railway & Power Company, as lessee, was irrelevant and immaterial.

The court overruled each and every one of said objections and allowed and admitted said tax return in evi-

dence over the said objection of movants and each of them, and movants say that it was error for the court to overrule said objections and each of them and that said objections and each of them were valid and legal objections and should have been sustained. The court in overruling said objections held that under the order of Judge Thomas ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

7. Because the court erred, as movants contend, in admitting over objection of movants and each of them, that portion of the Annual Return for Taxation of the Georgia Railway & Power Company, lessee of the Georgia Railway & Electric Company, on January 1, 1925, as follows, to wit: "Pro rata Value Personal Property, $32,948."

Movants and each of them at the time said evidence was offered objected to the same upon the following grounds:

(a) Said evidence was irrelevant and immaterial. Personal property could not be made the basis of any special assessment and to allow personal property of the company and the value of personal property to be considered in a paving assessment or in arriving at a paving assessment would deprive movants and each of them of the equal protection of the law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States for [fol. 105] that with reference to all other persons and all other special paving assessments, personal property and the value thereof, was not considered, as a basis for paving assessments or at arriving at the amount of paving assessment and that said evidence was irrelevant and immaterial and should not be used as a basis for or considered in arriving at a special paving assessment against movants or any of them; that to have same considered in making a paving assessment against movants would deprive them of their constitutional right of the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States, for with reference to all other persons (than movants) personal property was not considered in making paving assessments.

The court overruled each and every one of said objections and allowed and admitted said portions of the tax return objected to and the entire tax return in evidence over the said objection of movants and each of them, and movants say that it was error for the court to overrule said objections and that said objections and each of them were valid and legal objections and should have been sustained. The court in overruling said objections held that under the order of Judge Thomas, ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

8. Because the court erred, as movants and each of them contend, in admitting over objection of movants, a certified copy of the "Annual Return for Taxation," of the Georgia Railway & Power Company, Lessee of the Georgia Railway & Electric Company, made January 1, 1926, to the Comptroller-General of the State of Georgia, as follows:

[fol. 106] "Annual Return for Taxation

On the Georgia Railway and Power Company, Lessee Georgia Railway & Electric Company Street Railroad Company of all property owned by said Company on Jan. 1, 1926, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said Company.

Cities or towns	Main and side track, miles	Value of real estate	Trolley wires and poles and electric overhead and underground construction and steam heat and gas mains	Value of track and real estate	Value of franchise	Value	Pro rata value personal property	Aggregate value in county
Decatur.....	6.267	4,500	39,311	125,282	103,067	81,471	34,604	262,953

[fol. 107] Movants and each of them at the time the same was offered objected to the same on the following grounds:

(a) That it was entirely irrelevant and immaterial. That it could have no bearing upon the issues or questions involved in said case.

(b) Movants and each of them objected to said evidence and to the portion of said tax return at the time the same was offered, to wit, "Value of Real Estate, $4,500," for the reason that the said evidence was irrelevant and immaterial that it was not contended that the special assessment in question was made against any particular real estate and it is not shown where said real estate was located, and that the return with reference thereto was irrelevant and immaterial.

(c) Movants and each of them specially and separately objected to the item, "Trolley Wires and Poles and Electric Overhead, etc., $39,311" for the reason that the said portion of said return was irrelevant and immaterial.

(d) Movants and each of them separately objected to the item, "Pro-rata Value Personal Property, $34,604," for the reason that said portion of said return was irrelevant and immaterial.

(e) Movants and each of them separately and specially objected to the item, "Value of Franchise, $103,067" on the annual tax return as being irrelevant and immaterial.

At the time same was offered, movants objected to said portion of said evidence herein set out as being irrelevant and immaterial and upon the further ground that the franchise of the street railway company and the entire franchise, together with all the property of the street railway company, used in street railway operation, was tendered to the plaintiff in payment of the assessment in question and that the assessed value thereof or the amount returned [fol. 108] for taxes in the "Annual Return for Taxation" of the Georgia Railway & Power —, as Lessee, was irrelevant and immaterial.

The court overruled each and every one of said objections and allowed and admitted said tax return in evidence over the said objection of movants and each of them, and movants say that it was error for the court to overrule said

objections and each of them and that said objections and each of them were valid and legal objections and should have been sustained. The court in overruling said objections held that under the order of Judge Thomas, ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

Because the court erred, as movants contend in admitting over objection of movants and each of them, that portion of the annual Return for Taxation, of the Georgia Railway & Power Company, Lessee of the Georgia Railway & Electric Company, on January 1, 1926, as follows, to wit: "Pro rata Value Personal Property, $34,604."

Movants and each of them at the time said evidence was offered objected to the same upon the following grounds:

(a) Said evidence was irrelevant and immaterial. Personal property could not be made the basis of any special paving assessment and to allow personal property of the company and the value of personal property to be considered in a paving assessment or in arriving at a paving assessment would deprive movants and each of them of the equal protection of the law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States for that with reference to all other persons and all [fol. 109] other special paving assessments, personal property and the value thereof, was not considered, as a basis for paving assessments or at arriving at the amount of paving assessment and that said evidence was irrelevant and immaterial and should not be used as a basis for or considered in arriving at a special paving assessment against movants or any of them; that to have same considered in making paving assessment against movants would deprive them of their constitutional right of the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States, for with reference to all other persons (than movants) personal property was not considered in making paving assessments.

The court overruled each and every one of said objections and allowed and admitted said tax return in evidence over the said objection of movants and each of them, and

movants say that it was error for the court to overrule said objections and that said objections and each of them were valid and legal objections and should have been sustained. The court in overruling said objections held that under the order of Judge Thomas, ruling on the demurrer in said case, said entire Return for Taxation was admissible in evidence. Movants and each of them say that the ruling was erroneous and that the court erred in admitting said evidence and in not sustaining each of the objections made to the same.

10. Because the court erred, as movants and each of them contend, in refusing to allow, over the objection of plaintiff, the franchise under which the street railway lines in question and the street railway lines along the street being paved were constructed and being operated. The said franchise which the court refused to allow in evidence being as follows:

[fol. 110] "An ordinance granting the right of the Georgia Railway & Electric Company to remove and to discontinue the operation of the tracks and structures formerly known as the Atlanta Railway Company in the Town of Decatur, Georgia, under certain conditions and restrictions in said ordinance set forth.

"Whereas, the said Georgia Railway and Electric Company, which has succeeded to all the property rights and franchises of said Atlanta Railway Company, did heretofore commence to tear up the tracks and other structures formerly known as the Atlanta Railway Company in said Town of Decatur, with the intention of discontinuing the operation of said line of railway.

And, whereas, said Georgia Railway and Electric Company was prevented from removing said structures, and from discontinuing the operation of said line of Railway by a temporary restraining order granted by the judge of the superior court of Fulton County upon the petition of said Town of Decatur against said Georgia Railway and Electric Company, which said petition is now pending in said court, and returnable to the March Term, 1903:

And, whereas, the President, Vice-President and Manager of said Georgia Railway & Electric Company have appeared before the Mayor and Council of said Town of Decatur on several occasions, and urgently requested that said Georgia Railway & Electric Company be allowed by said

Mayor and Council to take up and discontinue the operation of said Atlanta Railway Line, urging as a reason for such action by said Mayor and Council that, if allowed to take up and discontinue said line known formerly as Atlanta Railway Company, said Georgia Railway & Electric Company could and would give to the citizens of said Town of Decatur, better street car facilities upon another parallel [fol. 111] line of street railway between the City of Atlanta and the Town of Decatur owned by said Georgia Railway & Electric Company and formerly known as the Atlanta Rapid Transit line, the same being the line of street railway running from Atlanta to Decatur along the Georgia Railroad and immediately north thereof:

"Now, therefore, be it ordained by said Mayor and Council, and it is hereby ordained by said authority, that the authority, right, permission and consent are hereby granted to said Georgia Railway and Electric Company to discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line referred to and known as the line of the Atlanta Railway Company in the Town of Decatur, extending along and over the following route in said Town of Decatur, to wit:

Entering said town on the western side thereof at what is known as Swanton Hill, and running thence in a northeasterly direction until it strikes what is known as Electric Avenue; thence along said Electric Avenue in a northerly direction to Atlanta Street; thence along Atlanta Street in an easterly direction to South Court Square, which is a continuation of Atlanta Street; thence along said South Court Square to McDonough Street; thence south along McDonough Street to Depot or Harring Street; thence in a southeasterly direction along Depot or Herring Street to North Railroad Avenue; thence east along said North Railroad Avenue to the eastern limit of said town; and continuing east a short distance beyond said town limit; thence running north, and running north about the distance of two blocks, thence turning west, and running west until it again strikes the eastern limit of said town where said limit crosses Broad Street; thence continuing west along said Broad Street in said Town to the North Court Square [fol. 112] which is a continuation of said Broad Street; thence continuing west along said North Court Square to West Court Square; thence along West Court Square to

South Court Square where said line connects with the same line described as entering said town, forming a loop; upon the conditions and restrictions hereinafter specified.

Section 2. Be it further ordained, that in consideration of the above mentioned rights granted by said town to said Georgia Railway & Electric Company, and in consideration of the benefits that said Georgia Railway & Electric Company will derive from discontinuing and taking up the structures comprising said Atlanta Railway Company, the said authority, rights, and privileges above referred to are granted and conferred only upon conditions that this ordinance shall first be accepted by said Georgia Railway & Electric Company and that said Georgia Railway & Electric Company, its successors and assigns, whether by contract or by operation of law, shall be bound to do the following things, to wit:

First. Upon the removal of the tracks and structures above referred to, to restore the surface of those streets from which such tracks and structures shall be removed to as good condition as the same are now in.

Second. To never charge more than five cents for one fare, upon its main Decatur line, above referred to as the Rapid Transit line, for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta and the trip either way shall include the entire loop in the Town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of 12 o'clock midnight and five o'clock a. m.; the [fol. 113] said Rapid Transit Line above referred to having the following route, to wit:

Commencing in the City of Atlanta at the intersection of Peachtree Street and Edgewood Avenue and running thence in an easterly direction along Edgewood Avenue to Hurt Street; thence in a southerly direction along Hurt Street to Decatur Street; thence along Decatur Street, which is immediately north of the Georgia Railroad, in an easterly direction to a point where said street is intersected by the line between the Counties of Fulton and DeKalb, thence continuing in the same general direction, imme-

diately north of said Georgia Railroad until it intersects the western limit of said Town of Decatur where it crosses North Railroad Avenue; thence continuing in the same direction in the Town of Decatur along said North Railroad Avenue to North Candler Street, thence along North Candler Street north *to* a short distance to a continuation of said North Railroad Avenue, thence in an easterly direction along said continuance of said North Railroad Avenue to Oak Street, thence north along Oak Street to Broad Street, thence west along said Broad Street to East Court Square; thence south along East Court Square to South Court Square, thence west along said South Court Square to McDonough Street, thence south along said McDonough Street to said North Railroad Avenue, there connecting with said line a short distance from where it enters said Town of Decatur coming from Atlanta and forming a complete loop within the Town of Decatur.

Third. To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said city, and vice versa, which does not [fol. 114] result however in carrying the passenger on a parallel line, or in the same general direction from which he came, provided such transfer is requested at the time of the payment of the fare, and provided the passenger shall abide by such reasonable rules and regulations as the company may make, so as to limit the time in which such transfer is used, in order that it may be available only for the first connecting car, and in order to cover such other matters as the company may deem necessary or proper to protect the company from imposition, abuse, or assignment of such transfer, and to avoid liability in damages from mistakes that may be made by the passengers or the employees in regard to such transfer.

Fourth. To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit line from terminus to terminus, the loop already described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain per-

mission to construct said double track, which said double track, when completed shall be maintained in a substantial safe and expeditious manner and shall be operated with care and rolling stock kept in a safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted.

Be it further ordained that the terms of this ordinance shall be accepted by said Georgia Railway & Electric Company, at a meeting of its Board of Directors, so that the same may appear upon the minutes of said Board of Directors, within thirty days from the passage thereof, and the terms of this ordinance shall not be effective until so accepted, and an agreement embodying the terms thereof [fol. 115] shall have been entered into by the said Town of Decatur and said Georgia Railway & Electric Company, executed by the mayor and clerk of said town, on the part of said town, and by the President and Secretary of said company, or by such officers of said company as under its charter are authorized to execute deeds to realty, which agreement shall in addition to the above terms, reconvey to said town any rights, grants or franchises that said Georgia Railway and Electric Company may have acquired within said Town of Decatur as successor to the rights, grants and franchises of the said Atlanta Railway Company acquired from said Town of Decatur.

Section 3. Be it further ordained that all ordinances or parts of ordinances in conflict herewith are hereby repealed.

"Be it resolved by the Board of Directors of the Georgia Railway & Electric Company that the ordinances adopted by the Mayor and Council of the Town of Decatur on March 3rd, 1903, conferring the right and authority upon this company to discontinue the operation of, abandon and remove the tracks and poles and other structures constituting the street railway line known as the Atlanta Railway line in said Town of Decatur, and covering the route described in said ordinance, be and the same is hereby accepted upon the terms set forth in said ordinance and the terms and conditions set forth in said ordinance to be approved by this company are hereby agreed to by it in consideration of the right to remove said line conferred by said ordinance.

Be it further resolved that the President and Secretary of this company are hereby authorized to sign and enter in

to with said Town of Decatur in the name of and on behalf of this company, an agreement embodying the terms of said ordinance in accordance with the requirements of said ordinance.

[fol. 116] This agreement made this 1st day of April, 1903, by and between the Town of Decatur, a municipal corporation in the County of DeKalb, State of Georgia, acting by and through its mayor and council party of the first part, and the Georgia Railway & Electric Company, a corporation under the laws of Georgia with its principal office in the County of Fulton, party of the second part, witnesseth, that,

Whereas, the Mayor and Council of said Town of Decatur did on March 3rd, 1903, adopt an ordinance, a copy of which is hereto attached and made a part hereof;

And, whereas, the terms of said ordinance were accepted by the said Georgia Railway & Electric Company, at a meeting of its Board of Directors held on March 31, 1903, a copy of the resolution adopted by said Board of Directors being hereto attached and made a part hereof.

Therefore, in accordance with the provisions in said ordinance and in consideration of the mutual covenants and agreements herein contained, the parties hereto contract and agree with each other as follows:

1. Party of the first part hereby confers the authority, right, permission and consent of said Georgia Railway & Electric Company, and contracts and agrees that said company shall be allowed and permitted to at once discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the street railway line, known as the line of the Atlanta Railway Company in the Town of Decatur and extending along and over the route in said Town of Decatur and specified in said ordinance.

2. The said Town of Decatur further agrees to do and perform all things provided to be done or performed on its part by the ordinance hereinbefore referred to.

3. In consideration of the benefit of said party of the second part from discontinuance, abandonment and re-
[fol. 117] moval of the said line of railway hereinbefore referred to, and in further consideration of the benefits to be deprived by it from the performance on the part of the

Town of Decatur of the provisions undertaken to be performed by it under said ordinance said party of the second part hereby contracts and agrees with the said Town of Decatur that it, (the said Georgia Railway & Electric Company) will, upon its part, do and perform all things specified in said ordinance to be done and performed by it, and will keep and observe the conditions and terms of said ordinances.

4. Said Georgia Railway & Electric Company further hereby surrenders to said Town of Decatur the franchise formerly belonging to the Atlanta Railway Company, in said Town of Decatur, and conveys and quit-claims to the said Town of Decatur all right, title or interest which the said Georgia Railway & Electric Company has or may have had in and to the said franchise owned by the Atlanta Railway Company, in the said Town of Decatur.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year hereinabove written as the date hereof; the Town of Decatur acting by and through its Mayor and Clerk, and the Georgia Railway & Electric Company acting by and through its President and Secretary, all hereunto authorized, executed in duplicate.

Town of Decatur, by J. W. Mayson, Mayor. (Seal.)
L. J. Steele, Clerk. (Seal of Town of Decatur.)

Signed, sealed and delivered as to the Town of Decatur, in DeKalb County, Georgia, in the presence of Ben E. Ragsdale, W. M. Ragsdale, Ordinary.

[fol. 118] Georgia Railway & Electric Company, by P. S. Arkwright, President. (Seal.) Thos. K. Glenn, Secretary. (Seal of Georgia Railway & Electric Co.)"

Signed, sealed and delivered as to Georgia Ry. & Elec. Co. in the County of Fulton, State of Georgia in the presence of L. P. Paire. R. E. Cullinane, Notary Public, Fulton Co. Ga."

The only objection made to the admission of said franchise in the evidence was that the same was irrelevant and immaterial.

Movants and each of them contend that the court erred in refusing to allow said franchise in evidence and contend

that said franchise was relevant and material, for that it was relevant as showing the municipal franchise under and by virtue of which the particular line was constructed and being operated, and that the said franchise was relevant and material for the reason that movants expected to go further and show that the special paving assessment in question does not and cannot increase the value of the street railway property of movants or any of them and that the street railway property, under and by virtue of the franchise under which it was constructed and operated, received and could receive no benefits from the special paving assessment in question.

Movants and each of them further contended that the said municipal franchise was relevant and pertinent as showing a separate and distinct municipal franchise from the City of Decatur with reference to the particular line in question and the line located along and in the street paved. [fol. 119] Movants and each of them contended that said franchise was relevant and pertinent and was offered for the further purpose of showing a separate and distinct franchise from the City of Decatur with a view to showing, in connection with the franchise, that the paving in question was done upon a portion of the street occupied by the street railway under and by virtue of this franchise and that the whole of this franchise and the entire street railway line and property was offered to be surrendered to the City of Decatur to prevent an assessment against it for the paving in question, and prior to the adoption of the ordinance the plaintiff, (City of Decatur) refused to accept this surrender and the paving ordinance was passed; and since that time, the entire street railway line together with the franchise have been tendered to the City of Decatur. It being stated to the court at the time of offering said franchise, that this evidence with the other evidence just heretofore stated, was relevant as showing that this was a separate franchise with reference to the line in the City of Decatur, and that not only was tender made of the particular portion of the street railway covered by said paving ordinance but with reference to the whole of the street railway line in Decatur and with reference to the entire franchise.

At the time of offering said franchise, movant further stated that they expected by offering said franchise, to

show a separate franchise, and that no value was received by virtue of the street paving and that this franchise was relevant upon the question of benefits—it being contended by movants and each of them, that the street railway company is entitled to the same benefit which sustains special paving assessments against other parties and the street railway company and its property must receive benefits to sustain the paving assessment against it and its property, [fol. 120] and that this franchise was one of the steps and one of the links of the evidence offered by movants and each of them as sustaining the contention of movants that not any of them or the property of any of them had received any benefits from the street paving assessment in question.

The court refused to allow said franchise in evidence and held that the same was irrelevant and immaterial and that under the ruling of Judge Thomas overruling each of the movants' motion- to dismiss the petition, the question of benefits or lack of benefits was irrelevant and immaterial, and movants say that this ruling of the court was erroneous and that the said franchise was admissible in evidence and was relevant and material evidence, movants stating that they expected to show by other witnesses in this connection that no special benefits were received by movants or any of them or the property of any of them from the special paving assessment in question.

11. Because the court erred, as movants and each of them contend, in refusing to allow the following letter from P. S. Arkwright, President of the Georgia Power Company, to Mr. Looney, City Manager of Decatur, to wit:

"DEAR MR. LOONEY:"

"On my return to the city Mr. Butler brought to my attention your notice with reference to the paving of Ponce de Leon Avenue from Oak Street in the City of Decatur.

This company can neither do this paving itself nor pay for it should the City of Decatur do it. The particular line is being operated at a very considerable loss and has been sustaining such loss over a long period, and the prospects are that it will continue to be operated at a loss as long as it is operated at all.

This additional paving burden which, if enforced against us, would involve us in an expense of from $21,000 to $25,-

[fol. 121] 000 is more than the line can bear. Under these circumstances, we would be willing to surrender to the City of Decatur the franchise for this line and remove those tracks from the streets. To this end I have written Mr. L. J. Steele, City Attorney, a letter, copy of which is enclosed.

I respectfully request that some way be found not to enforce this paving charge against us, as of course we would rather not surrender the franchise if it can be avoided.

Yours very truly, P. S. Arkwright, President."

The objection made to admission of said evidence by the plaintiff, City of Decatur, was: First, that it is merely an offer to compromise this claim, which is never admissible in evidence. Second: we object to it on the ground that it constitutes no defense to this action nor any part of any defense.

Movants and each of them contended that said evidence was relevant and material on the question of benefits and as showing that prior to the paving in question the City of Decatur was put on notice that movants and movants' properly would and could receive no benefit from the paving and that prior to the paving in question and the paving assessment in question the plaintiff was put on notice that no benefits would be received by movants or any of movant's property from the paving and they would be willing to surrender and cease operating under the said franchise in Decatur.

The court sustained the objection of plaintiff and refused to allow said letter in evidence, holding that under the state of the pleadings and the decision of Judge Thomas overruling the demurrer to the petition, the said letter was not admissible and that the question of benefits or lack of [fol. 122] benefits for the paving assessment in question was not relevant nor material.

Movants and each of them say that it was error for the court to exclude said letter and that it was error for the court to hold that the benefits or lack of benefits was irrelevant and immaterial, and error for the court to exclude said letter and not to admit the same together with the other evidence which movants stated they expected to introduce with reference to showing that none of the movants and none of movants' property would or could receive any benefits from the special paving assessment in question.

12. Because the court erred, as movants and each of them contend, in refusing to allow the following letter from P. S. Arkwright, President of the Georgia Power Company, to Mr. L. J. Steele, City Attorney of the City of Decatur, to wit:

"DEAR MR. STEELE:

Your letter of July 7th, with reference to paving Oak Street from the Georgia Railway to Ponce de Leon Avenue, and paving Ponce de Leon Avenue from the Court-house east, has been received.

"In order to meet the cost of this paving and the track reconstruction incidental thereto, it would be necessary for this company to pay from $21,000 to $25,000, dependent on the plan adopted for the work.

"This street railroad line is now, and has been for a long time past, operated at a very great loss. Under existing conditions it is impossible to make this line pay the cost of operation. As an inevitable result of this condition the line cannot bear the burden of this paving cost.

"If the City of Decatur insists upon this paving we would prefer to surrender the franchise for this line rather than be subjected to the expense. I would appreciate it if you [fol. 123] would please take it up with the City of Decatur and let me know what their views on the subject may be. In the event they would prefer to have this franchise surrendered I will call a meeting of the Board of Directors of the Company and I am sure they will unanimously and immediately pass the necessary resolutions authorizing the surrender of the franchise.

"Naturally we do not want to do this, but we can't pay for the paving and we would rather surrender the franchise than have this additional burden placed upon us under the present conditions.

Yours very truly, P. S. Arkwright, President."

The objection made to admission of said evidence by the plaintiff, City of Decatur, was: First, that it is merely an offer to compromise this claim, which is never admissible in evidence. Second, we object to it on the ground that it constitutes no defense to this action nor any part of any defense to this action.

Movants and each of them contended that said evidence was relevant and material on the question of benefits and as showing that prior to the paving in question the City of Decatur was put on notice that movants and movants' property would and could receive no benefit from the paving and that prior to the paving in question and the paving assessment in question the plaintiff was put on notice that no benefits would be received by movants or any of movants' property from the paving and that they would be willing to surrender and cease operating under the said franchise in Decatur.

The court sustained the objection of plaintiff and refused to allow said letter in evidence, holding that under the state of the pleadings and the decision of Judge Thomas over-[fol. 124] ruling the demurrer to the petition, the said letter was not admissible and that the question of benefits or lack of benefits for the paving assessment in question was not relevant nor material.

Movants and each of them say that it was error for the court to exclude said letter and that it was error for the court to hold that the benefits or lack of benefits was irrelevant and immaterial, and error for the court to exclude said letter and not to admit the same together with the other evidence which movants stated they expected to introduce with reference to showing that none of the movants and none of movants' property would or could receive any benefits from the special paving assessments in question.

13. Because the court erred, as movants and each of them contend, in refusing to allow the following letter from P. S. Arkwright, President of the Georgia Power Company, to Mr. L. J. Steele, City Attorney of the City of Decatur, dated July 16, 1925, to wit:

"DEAR MR. STEELE:

"It is a little more than I think the people of Decatur ought to expect of us—to furnish electric railway service at a grossly inadequate fare and then have to pave the streets of the town besides. This is certainly not a good thing for us and in the long run I don't think it is a good thing for Decatur. In any event, we can only do what we are able to do and this depends exclusively on the earnings of the street railway. The street railway system as a whole

is not earning its way even at the fare of 7 cents allowed in Atlanta. The fare of 5 cents insisted upon by the Town of Decatur is rapidly confiscating the property and runs the losses of the line to Decatur up to such an amount that there is nothing left with which to pay for street paving. [fol. 125] In any event, this company cannot pay for the paving in Decatur, nor can it rebuild or recondition its tracks in connection with the paving.

"Under the circumstances if the City of Decatur insists on paving streets and assessing this company for it I repeat in all earnestness my suggestion that we surrender the franchises of the street railway in Decatur. If, however, the City of Decatur, refuses to accept this then I don't know what can be done. Certainly we cannot pave the streets, nor pay paving assessment for paving the streets, nor can we do any work on the track in connection with the paving.

Yours very truly, P. S. Arkwright, President."

The objection made to admission of said evidence by the plaintiff, City of Decatur, was: First, that it is merely an offer to compromise this claim, which is never admissible in evidence. Second, we object to it on the ground that it constitutes no defense to this action nor any part of any defense to this action.

Movants and each of them contended that said evidence was relevant and material on the question of benefits and as showing that prior to the paving in question the City of Decatur was put on notice that movants and movants' property would and could receive no benefit from the paving and that prior to the paving in question and the paving assessment in question the plaintiff was put on notice that no benefits would be received by movants or any of movants' property from the paving and that they would be willing to surrender and cease operating under the said franchise in Decatur.

The court sustained the objection of plaintiff and refused to allow said letter in evidence, holding that under the state of the pleadings and the decision of Judge Thomas over- [fol. 126] ruling the demurrer to the petition, the said letter was not admissible and that the question of benefits or lack of benefits for the paving assessment in question was not relevant nor material.

Movants and each of them say that it was error for the court to exclude said letter and that it was error for the court to hold that the benefits or lack of benefits was irrelevant and immaterial, and error for the court to exclude said letter and not to admit the same together with the other evidence which movants stated they expected to introduce with reference to showing that none of the movants and none of movants' property could or would receive any benefits from the special paving assessment in question.

14. Because the court erred, as movants and each of them contended, in refusing to allow in evidence a certified copy of the ruling and holding of the Georgia Public Service Commission on the application of the Georgia Power Company to increase street railway fares in the City of Decatur, to wit:

"On an application of the Georgia Railway & Power Company to increase street car fares on various lines, the Railroad Commission of the State of Georgia on September 22nd, 1920, fixed street railway fares over various lines at 7 cents per passenger. In this order on said date the commission said:

"Prior to April 14, 1919, applicant had in effect on its city and suburban lines, five cent fares with free transfers.

'Effective August 4, 1919, a maximum fare of six cents was authorized where a five cents fare was then charged, except as to fares between Atlanta and Decatur on the Main Decatur line and between Atlanta and College Park on the College Park line fixed by contracts between the company and the Towns of Decatur and College Park, held by the Supreme Court of Georgia to be valid:

[fol. 127] 'Patrons on these two lines intermediate between Atlanta and Decatur and College Park pay six cents fares * * *

'The five cent fares now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes are discriminatory. The Commission is without power to increase them * * * increased facilities are required on the main Decatur and College Park routes, which will result in im-

proved service. * * * As to the main Decatur and College Park routes, on which trailers shall be used on all schedules operated during rush hours."

The objection made to said evidence was that it was irrelevant and immaterial and not binding on plaintiff.

Movants and each of them contend that said evidence was relevant and material as a part of the evidence being offered by movants to show that movants and movants' property received and could receive no benefit whatever from the street paving in question and that this evidence was relevant as showing that the street railway fare upon the lines in question by virtue of the franchise under which the line was being operated could not be raised or changed so as to keep the operation of said line from being confiscatory; and that movants and each of them contended at the time of offering said evidence that it was relevant and material on the question of the entire lack of benefits to movants and to the property of movants. Movants and each of them contend that the court erred in refusing to allow the admission of said testimony.

15. Because the court erred, as movants and each of them contend, in refusing to allow the following notice to the City of Decatur with reference to the discontinuance of service, to wit:

[fol. 128] "September 26, 1925.

"To the Hon. Mayor and Commissioners, City of Decatur, Ga.

DEAR SIRS:

Enclosed is a formal surrender by Georgia Railway & Electric Company, owner, and Georgia Railway & Power Company, Lessee, of the franchises or permits for the construction and operation of the electric railway within the city limits of Decatur, extending along North Railroad Avenue, Oak Street, Broad Street, East Court Square, South Court Square, and McDonough Street.

"We desire to give notice in advance of the discontinuance of the operation of this electric railway line so as not to discommode the patrons of the line any more than is necessary.

"Accordingly, you are notified that we will discontinue operation of this electric railway line at the end of the regular schedule on September 30th, 1925.

"You are now engaged in paving some of the streets on which this line has been constructed. We suggest the advisability of suspending the paving operation until the track is taken up as, of course it will be necessary to disturb the paving in order to remove the track.

"In this connection, we would like also to protest against the work you are doing on this track. We have already protested against the paving. We call your attention also to the fact that you are improperly replacing this track and due to the manner in which you are having this work performed both the track and the paving will very soon go to pieces should cars be operated over it.

"While we have placed October 1st as the date when operations will be discontinued, still if you are willing let us known and we will discontinue immediately.

Yours very truly, P. S. Arkwright, President."

[fol. 129] No. 31A

"To the Hon. Mayor and Commissioners, City of Decatur, Ga.

DEAR SIRS:

On or about September 4th, 1899, the Town of Decatur granted the Collins Park and Be Railroad in the Town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, which permit or franchise was transferred subsequently to Georgia Railway & Electric Company. Also, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about March 3, 1903, the said permit or franchise was amended and an additional permit granted to double track a part of said route.

Under the said permits or franchises the said electric railway line has been constructed and operated and is now being operated in the City of Decatur, Georgia, and the

same, with its permits and franchises, has been leased to Georgia Railway & Power Company for a term of years.

The said line of electric railway in the City of Decatur is operated at a loss and the revenues derived therefrom do not yield the cost of operating the same or earn enough to pay the taxes on account of the same. Because the rate of fares which may be charged on the said line of electric railway is unalterably fixed and rightly limited to a sum less than the cost of furnishing such service. It is impossible ever to earn on such electric railway the cost of its operation, and such operation cannot be continued except at a certain and continuing loss.

[fol. 130] Consequently, Georgia Railway & Electric Company, as the owner of said permits and franchises, and Georgia Railway & Power Company as the Lessee thereof, concurring herein, hereby formally surrender the said permits and franchises granted by the Town and City of Decatur for the construction and operation of the said electric railway hereinbefore referred to.

Attached hereto are certified copies of resolutions adopted by the Board of Directors of Georgia Railway & Electric Company and Georgia Railway & Power Company, authorizing the surrender of such franchises.

Yours very truly, Georgia Railway & Electric Company, by John C. Hollman, Vice President. Georgia Railway & Power Company, by P. S. Arkwright, President."

No. 31B

"The resolutions adopted by the Board of Directors of Georgia Railway & Electric Company with reference to authorizing the surrender for the street railway franchise and permit therein described, from the Town of Decatur, were submitted to and read to the meeting.

Whereupon, the following resolution was offered and unanimously adopted, to-wit:

Whereas, by the consent and with the concurrent of this company, Georgia Railway & Electric Company, by action of its Board of Directors, has this day authorized the surrender to the Town of Decatur of the permit or franchise to construct and operate an electric street railroad in the Town of Decatur from the western town limits to North

Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, [fol. 131] thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, and

Whereas, on or about March 18, 1912, the said line of electric railway, with the said permit or franchise, was leased to this company for a terms of years, and

Whereas, the said electric railway is operated at a loss and its revenues do not yield sufficient to pay the actual cost of operation and the rates of fare thereon are unalterably fixed and rigidly limited to a sum so low that it is impossible for said electric railway ever to pay the actual cost of operation:

Therefore be it resolved by the Board of Directors of Georgia Railway & Power Company that it assents to and concurs in the resolution adopted by the Board of Directors of Georgia Railway & Electric Company authorizing the surrender of the said franchise to the City of Decatur and the officers of this company are hereby authorized to join in such surrender on behalf of this company and to discontinue operation of the said electric railway line and to take up and remove the tracks and other structures built under the said permits and franchises.

Be it further resolved that in the event such surrender is made it shall not in any way or manner affect the obligation of this company under the said lease, but the said lease shall remain in full force and effect, except as to the said railway track in the City of Decatur and the franchise therefor.

Be it further resolved that the officers of this company be and there are hereby authorized and directed to do and perform any and all acts and enter into and execute any and all instruments or "writings" necessary or proper in their judgment to carry this resolution into effect.

[fol. 132] No. 31C

Whereas, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about September 4, 1899, a permit or franchise was granted to the Collins Park and Belt Railroad Company to build, electrically equip and operate an electric street railroad in the Town of Decatur

from the western town limits on North Boulevard Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Square, thence along East Court Square to South Court Square, thence along South Court Square to McDonough Street, thence along McDonough Street to North Railroad Avenue, the name of said Collins Park and Belt Railroad Company having been subsequently changed to Atlanta Rapid Transit Company, and

Whereas, said Atlanta Rapid Transit Company, on or about March 28, 1902, transferred and conveyed the said permit or franchise, together with the electric railway built thereunder, to Georgia Railway & Electric Company, and

Whereas, by ordinance adopted by the Mayor and Council of the Town of Decatur on or about March 3, 1903, the said permit or franchise was amended and an additional permit granted to double track as part of said route, and

Whereas, on or about March 18, 1912, the said line of electric railway, with the said permit or franchise, was leased to the Georgia Railway & Power Company for a term of years, and

Whereas, the said electric railway is operated at a loss and its revenues do not yield sufficient to pay the actual cost of operation and the rates of fare thereon are unalterably fixed and rigidly limited to a sum so low that it is impossible for said electric railway ever to pay the actual cost of operation.

[fol. 133] Now, therefore, be it resolved by the Board of Directors of Georgia Railway and Electric Company (Georgia Railway and Power Company, Lessee, concurring herein) that the officers of this company are hereby authorized and empowered to surrender the franchise and permit hereinbefore described in the preamble to this resolution, granted by the Town of Decatur to Collins Park and Belt Railroad Company and the Georgia Railway and Electric Company, and to discontinue operation of the said electric railway and to take up and remove the track and other structure built under the said permits and franchises.

No. 31D

Be it further resolved that in the event such surrender is made Georgia Railway and Power Company, lessee, be

and it is hereby released, relieved and absolved from continuing to operate the said line of electric railway or maintaining or preserving the said permits and franchises, such act in no way or manner to affect the obligations of Georgia Railway and Power Company under the said lease, but the same to remain in full force and effect except as to the said railway track in the Town of Decatur and the franchise theretofore hereinbefore described.

Be it further resolved that the officers of this company be and they are hereby authorized to do and perform any and all acts and enter into and execute any and all instruments or writing necessary or proper in their judgment to carry this resolution into effect."

Movants and each of them say that each of said papers herein set out were offered separately and as a whole. Upon the offering of said testimony the plaintiff stated in open court that the resolutions could be considered as a resolution passed by the proper corporate officials and corporate bodies and that it was agreed that the resolutions heretofore [fol. 134] set out were passed and that the letters were sent, the objection being made to said testimony by the plaintiff that the same was irrelevant and immaterial and upon the further objection that it was offered to compromise and a settlement. The court sustained the said objection and refused to allow said testimony in evidence.

At the time of offering testimony above referred to, it was stated by movants and each of them that the said resolutions were not an offer of compromise but a part of evidence which movant wished to introduce together with other testimony to show that movants and movants' property received and could receive no benefit from the street railway paving in question and that movants offered and tendered the street railway franchise in question and offered to discontinue the operation of the street railway lines in the City of Decatur and that said testimony was admissible as showing that prior to the paving assessment in question, petitioner, City of Decatur, had notice of the contentions of movants and each of them and in this connection movants offered in evidence the refusal of the City of Decatur to accept the surrender of said franchise, the said refusal offered in evidence being as follows:

"Ordinance of the Town of Decatur refusing the surrender of the franchise of the Georgia Railway and Electric

Company and the Georgia Railway & Power Company to wit:

Whereas, the Commissioners of the City of Decatur, on the 28th day of September, 1925, received from John C. Hallman, Vice President of the Georgia Railway & Electric Company, and P. S. Arkwright, President of Georgia Railway & Power Company, notice that said companies tendered to City of Decatur a surrender of the franchise granted by the Town of Decatur to Collins Park and Belt Railroad Company, September 4th, 1899, and also the amendment thereto granted by ordinance on the 3rd day of March, 1903; and

[fol. 135] "Whereas, it is not to the interest of the City of Decatur at this time, to accept the surrender of said franchises.

"Therefore, be it resolved by the Commissioners of City of Decatur, that the tender made by John C. Hallman, Vice President of Georgia Railway and Electric Company, and P. S. Arkwright, President of Georgia Railway & Power Company, of a surrender of the above stated franchise, and the amendment thereto, be not accepted, and the same is not accepted. "This September 28, 1925."

And movants and each of them say that upon the offer of the ordinance of the City of Decatur refusing the said surrender of the franchise, the plaintiff objected to the same on the ground that said ordinance was irrelevant and immaterial and the court refused to allow said ordinance in evidence over said objection, and movants and each of them say that said refusal to allow said ordinance in evidence was erroneous, it being stated to the court that the said ordinance was a part of the history of the paving assessment in question and that movants expected to show in connection with the same that none of the movants nor any of movants' property received or could receive any special benefit from the paving in question. The court held that the question of special benefits under the pleadings in said case and under the ruling of Judge Thomas overruling the demurrer to the petition, the question of benefits was irrelevant and immaterial and movants and each of them say that the court erred in so holding and in not admitting said papers, documents and ordinance in evidence.

Movants say that the ordinance of the City of Decatur

refusing to accept the surrender of the franchise in question was offered separately and independently from the other papers and that the court refused to allow the same [fol. 136] in evidence upon the objection of the plaintiff that it was irrelevant and immaterial.

16. Because the court erred, as movants and each of them contend, in refusing to allow the movants to introduce testimony that the movants and the property of movants received no special benefit from the street paving in question and in refusing to allow movants to introduce testimony to show that no benefits were received by movants or the property of movants from or by virtue of the paving in question for which the special paving assessment was made.

In this connection movants introduced as a witness, Mr. P. S. Arkwright for movants, and during the trial of said case, movants asked the witness the question whether or not movants or any of them, or the property of any of them had received any benefits or any special benefits of any kind or character from the paving in question. The court, on objection of plaintiff, held that said testimony was irrelevant and immaterial and that the question of benefits by virtue of the overruling of the demurrer to the petition by Judge Thomas, made the question of lack of benefits irrelevant and immaterial.

Movants aver that if said witness, P. S. Arkwright, had been permitted to answer the question, he would have answered that the street railway company and the street railway company's property, and movants and movants' property had received no benefit from the street paving in question, and to complete the record, the following is an extract from the testimony of the said witness, P. S. Arkwright, while on the stand and during the trial of said case:

"Q. Just make your answer, Mr. Arkwright, so as to complete the record.

A. I have been actively engaged in the supervision of the operation of street railway in Atlanta and suburbs for something over thirty years. I am familiar with the street [fol. 137] railway business, I suppose. I am acquainted with street railway operations elsewhere. I know the trend in street railway earnings and street railway uses. The pavement in question in Decatur added not one cent to the value of the street railway property at all. On the con-

trary, it was a detriment to the street railway operations. It makes it more difficult and expensive to maintain the track with the pavement then without it. The street railway does not use the pavement at all. It does not add any additional travel to the street cars. The line to Decatur from Atlanta is about six and a half miles long. The cost of transporting a passenger from Atlanta to Decatur or from Decatur to Atlanta is greater than five cents. The actual out of pocket expense of operating cost and taxes per passenger is greater than five cents.

"Q. Has any property located along any portion of the street that is paved received any benefit from the paving in question?

"A. No. Any special benefit, you mean?

"Q. Yes.

"A. No."

Movants and each of them say that said testimony excluded by the court upon the ground that it was irrelevant and immaterial, was material to the issues involved in said case and that it was material to the issues involved in said case whether the defendants or defendants' property received any benefits whatever from the street paving in question, and movants and each of them say that the refusal of the court to allow the witness to testify as above set out was erroneous, and movants say that said testimony was relevant and pertinent and was relevant and pertinent testimony upon the issues as made in said case under the pleadings, and movants and each of them say that the court erred in not admitting said testimony and in refusing to allow the same.

Colquitt, Parker, Troutman & Arkwright, Attorneys for movants.

[fol. 138] [File endorsement omitted.]

The recitals of fact in the foregoing amended motion for a new trial are approved as correct. The amended motion is allowed and ordered filed as part of the record in said case.

This October 14th, 1933.

G. H. Howard, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

ORDER DENYING NEW TRIAL

The within and foregoing motion for a new trial as amended, coming on for a hearing and after consideration, the said motion upon each and every ground is overruled and a new trial is denied.

Oct. 14, 1933.

G. H. Howard, Judge S. C. A. C.

[fol. 139] IN SUPERIOR COURT OF FULTON COUNTY

Number 91639

CITY OF DECATUR

v.

GEORGIA POWER COMPANY, GEORGIA RAILWAY AND POWER COMPANY AND GEORGIA RAILWAY AND ELECTRIC COMPANY

Trial June 20-21, 1933. Judge G. H. Howard, Presiding

Appearances:

For the plaintiff: Messrs. Branch & Howard. Messrs. Howell, Heyman & Bolding. Bond Almand, Esq. John Wesley Weeks, Esq.

For the defendants: Messrs. Colquitt, Parker, Troutman & Arkwright.

Brief of Evidence—Filed Oct. 14, 1933

OFFERS IN EVIDENCE

The plaintiff offered in evidence, and the same was admitted by the court without objection, "minute books of the City of Decatur, Volume 4, showing a meeting of the Commissioners of the City of Decatur held April 17th, 1925, and the passage of several ordinances;" also containing "the following recitals: The following ordinances were introduced and ordered advertised for hearing on Friday night May 15th, 1925; First, for the paving of East Ponce de Leon Avenue from East Court Square east to Sycamore

Drive with 6 "Bibrolithic Concrete or Asphaltic Concrete, except between the tracks of the Georgia Rwy. & Power Company, and for two (2) feet on each side thereof, which is to be paved with granite cubes, set in concrete and cement grouted." These minutes were certified by J. S. Looney, City Clerk, and he also, as such clerk, certifies that the ordinances referred to were duly passed."

The plaintiff introduced in evidence, and the same was [fol. 140] admitted by the Court without objection, a book containing "issue of the DeKalb New Era," a paper of general circulation in the City of Decatur and County of DeKalb, under date of April 23rd, 1925, containing "a notice relating to the introduction of the paving ordinance and reciting that it will be heard by the Commissioners on May 15th," said notice reading as follows:

"SPECIAL NOTICE

GEORGIA,
DeKalb County,
City of Decatur:

Notice is hereby given that the following ordinances were introduced at the regular meeting of the City Commissioners of the City of Decatur held on Friday night, April 17th, 1925, at the city hall, in the City of Decatur, Georgia.

For the paving of Atlanta Avenue from West Court Square to West College Avenue with 6" Vibrolithic Concrete.

For the paving of East Ponce de Leon Avenue from East Court Square east to Sycamore Drive with 6" Vibrolithic Concrete or Asphaltic Concrete, except between the tracks of the Georgia Railway and Power Company and for two (2) feet on each side thereof, which is to be paved with granite cubes set in concrete and cement grouted.

For the paving of North Oak Street from East Howard Avenue to East Ponce de Leon Avenue with 6" Vibrolithic Concrete or Asphaltic Concrete, except between the tracks of the Georgia Railway and Power Company, and for two (2) feet on each side thereof, which is to be paved with granite cubes set in concrete and cement grouted.

For the laying of concrete sidewalk, concrete curbing and rubble gutter on both sides of Herring Street, from McDonough Street to Atlanta Avenue.

For the laying of concrete curbing on both sides of North Oak St., from East Howard Avenue to Sycamore Street. [fol. 141] For the laying of concrete curbing on the south side of East Ponce de Leon Avenue between Barry and Oak Streets where curbing has not been laid, also for laying concrete curbing on both sides of East Ponce de Leon Avenue (extended) from Glenn Street east to Sycamore Drive.

A hearing will be given the above ordinances at the regular meeting of the City Commissioners, to be held on Friday night May 15, 1925, at 8 o'clock at the City Hall in the City of Decatur, Ga., and all property owners and those interested therein will be given full opportunity to show any cause that they may have against the proposed improvements.

This April 22, 1925.

J. S. Looney, City Clerk."

The plaintiff introduced in evidence, and the same were admitted by the court without objection, the minutes of a meeting "held May 15th, 1925, as recorded in the minutes, in which it is recited that a regular meeting of the Commissioners was called and ordered by the mayor, and then reciting that the following ordinances were adopted," and, under the statement "The following ordinances were adopted, an ordinance reading as follows:

"Ordinance of the City of Decatur for paving East Ponce de Leon Avenue as follows:

Whereas, the Commissioners of the City of Decatur, by virtue of the authority granted them under the character of said city, have full power and authority, in their discretion, to grade, pave, macadamize or otherwise improve the travel, and drainage of the streets, squares, public alleys and lanes of said city; and

Whereas, it is necessary for the public travel, and drainage of said streets, that the same should be improved; and [fol. 142] Whereas, it is the judgment of the Commissioners of said City, and by this ordinance they do declare, that the pavement of said streets with 5" Asphaltic Concrete, and with granite cubes between the tracks of the street car company and for two (2) feet on each side thereof, and that granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphaltic — or cement, according to the specifications and plans of the

City Engineer will properly improve said streets for the travel and drainage thereof, and that such improvements are necessary for such travel and drainage; and

Whereas, the Commissioners of said City are authorized under the charter of said City, to assess the cost, in full, for the paving between the tracks and for two (2) feet on each side thereof of the Street Railway Company, and to assess the remaining cost of said paving against the real estate abutting on such street; one half of such remaining cost to be assessed against the real estate abutting on one side of said streets, and one-half of said remaining cost to be assessed against the real estate abutting on the other side of said streets, where paved.

Therefore be it ordained by the Commissioners of the City of Decatur and it is hereby ordained by authority of the same, that North Oak Street from East Howard Avenue to East Ponce de Leon Avenue and East Ponce de Leon Avenue from East Court Square to Sycamore Drive be improved by paving the same with 5" Asphaltic Concrete and with granite cubes between the tracks of the Street Railway Company, and for two (2) feet on each side thereof, and that the granite cubes and ties of the car track be firmly set in a concrete base and the cubes grouted with asphalt or cement.

Be it further ordained, that when said street has been so improved, the City Manager of said City, shall make [fol. 143] up an assessment roll of the cost of such improvement, showing the total cost thereof and showing the total cost between the tracks of said railway company for two (2) feet on each side thereof, and showing the remaining cost of such improvement; that is, the cost after deducting from the total cost the cost of the paving of said tracks and for two (2) feet on each side thereof, and showing the number of feet of real estate abutting on each side of said streets, where paved, and the cost per lineal foot on each side of said streets, where paved, as provided by the charter of said City.

Be it further ordained, when the City Manager shall furnish to the commissioners, such assessment roll, they shall adopt an ordinance making an assessment against the Georgia Railway & Power Company for the total cost of the pavement between the tracks of said Company and for

two (2) feet on each side thereof; against the real estate abutting on each side of said streets, and against the owners thereof at the time of making said assessment; such remaining cost.

Be it further ordained, that such assessment be a lien against said Street Railway Company and against said property from the time of making said assessment, in terms of the charter of said City.

Be it further ordained, that upon adoption of said ordinance making said assessment, the Clerk of the Commissioners shall notify the respective owners of such property, and the Georgia Railway & Power Company, the amount of the assessment against their said properties, and he shall give them ten (10) days in which to make payment thereof and after ten (10) days he shall issue fi. fas. against the property, and the said owners thereof and against the Georgia Railway & Power Company for all assessments which may be in default, as provided by the charter of said [fol. 144] city, which fi. fas. shall be turned over to the Marshal of said city for levy and sale, if not paid.

Be it further ordained, that said Clerk shall publish notices of the introduction of this ordinance notifying the public and parties interested by publication in DeKalb New Era, one time, at least ten (10) days before the adoption of this ordinance, and such notice shall contain a statement of the street to be improved, the kind of pavement to be made; the date of the meeting of the Commissioners at which such ordinance will be considered for adoption, and the same may be adopted at such meeting or some subsequent meeting, in the discretion of the Commissioners, and any person interested in such improvement may file his objection to the adoption of such ordinance with the City Clerk and be heard by said Commissioners, if he may desire to appear and be heard.

Be it further ordained, that all ordinances or parts of ordinances in conflict herewith be, and the same are hereby repealed."

The plaintiff introduced in evidence, and the same was admitted by the court without objection, "statement from the minutes of the City of Decatur relating to a meeting of the Commissioners on May 21st, 1926, reciting that the

assessing ordinance, attached to the plaintiff's petition was duly enacted at that meeting, the same being as follows:

"Whereas, the Commissioners of the City of Decatur by ordinance adopted May 15, 1925, provided for paving East Ponce de Leon Avenue, from East Court Square to Sycamore Drive, in the City of Decatur; and

Whereas, said ordinance provided for the cost of paving between the tracks of the Georgia Railway & Power Company, and for two (2) feet on each side thereof be assessed against the Georgia Railway & Power Company, and pro- [fol. 145] vided, that one-half of the remaining cost for paving said avenue be assessed against the real estate abutting on the north side of said avenue, and that the other one half of said remaining cost be assessed against the real estate abutting on the south side of said avenue; and

Whereas, said East Ponce de Leon Avenue has been paved by the City of Decatur in accordance with said ordinance, adopted on May 15th, 1925; and

Whereas, the total cost of paving said avenue, according to the assessment roll of the City Manager, is $42,242.07 and

Whereas, the cost of paving between the tracks of the Georgia Railway & Power Company and or two (2) feet on each side thereof is, $13,444.66; and

Whereas, one-half of the remaining cost of paving said avenue, is $14,397.70; and

Whereas, there are 369992 feet of real estate abutting on the north side of said avenue, and 3699 feet of real estate abutting on the south side of said avenue; and

Whereas, the cost per lineal foot be assessed against the real estate abutting on the north side of said avenue, is $3.89½ per foot; and

Whereas, the cost per lineal foot be assessed against the real estate abutting on the south side of said avenue, is $3.89½ per lineal foot.

Therefore be it ordained by the Commissioners of the City of Decatur, and it is hereby ordained by authority of the same that for the paving of said Ponce de Leon Avenue between East Court Square and Sycamore Drive, the sum of $13,444.66 is hereby levied and assessed against the Georgia Railway and Power Company, and against the property of said company, the same being the cost of paving between tracks of said company and for two (2) feet

[fol. 146] on each side thereof, as said tracks run in and along said avenue.

Be it further ordained by the authority aforesaid, that the sum of $3.89½ per lineal foot is hereby levied and assessed against the real estate abutting on the north side of Ponce de Leon Avenue from East Court Square to Sycamore Drive, for the paving of said avenue, the same amounting to the sum of $14,397.70, and for one-half of said remaining cost for the paving of said avenue.

Be it further ordained by the authority aforesaid, that the sum of $3.89½ per lineal foot is hereby levied and assessed against the real estate abutting on the south side of Ponce de Leon from East Court Square to Sycamore Drive, for the paving of said Avenue the same amounting to the sum of $14,397.70, for one half of said remaining cost for the paving of said avenue.

Be it further ordained, that the City Clerk shall give notice to the Georgia Railway & Power Company the amount of the assessment made against said company for the paving of said street, and give them ten (10) days in which to make payment thereof.

Be it further ordained, that the City Clerk shall give the owners of the real estate abutting on said avenue between East Court Square and Sycamore Drive the amount of the assessment against their respective properties, and give them ten (10) days in which to make payment thereof.

Be — further ordained, that after the expiration of said ten (10) days, the City Clerk shall issue an execution against the Georgia Railway & Power Company for the cost of paving between its tracks and for two (2) feet on each side thereof, if said company shall be in default in making payment of said assessment, and shall likewise issue executions against the respective parcels of real estate [fol. 147] abutting on said avenue between East Court Square and Sycamore Drive, and against the owners thereof, if such owners are in default after said ten (10) days, and shall turn all such exceptions over to the Marshal of said city who shall proceed to make collections thereof by levy and sale, as provided by the charter of the City of Decatur.

Be it further ordained, that all ordinances and parts of ordinances in conflict herewith be and the same are hereby repealed."

Plaintiff introduced in evidence, and the same was admitted by the court, a nulla bona as follows:

"GEORGIA,
DeKalb County:

Due and legal search made and no property of the Georgia Railway & Power Company and/or Georgia Power Company and/or Georgia Railway & Electric Company was found in the City of Decatur, was found upon which the within execution could be levied or which is subject to levy and sale under this execution.

This the 2nd day of November, 1931.

G. S. Swords, Marshal."

STIPULATION

With reference to the property levied on on the 6th day of July, 1927, by M. E. Goodger, Marshal of the City of Decatur, the entry of which levy is set out in paragraph 12 of the plaintiff's petition, it is agreed that the substation never became the property of the Georgia Railway and Power Company or came into its possession except in so far as it may have done so under and by virtue of a lease between the Georgia Railway and Electric Company and Georgia Railway and Power Company, the provisions of [fol. 148] which are set out in the plaintiff's petition. That the said property is not on or adjacent to any street being paved under the assessment ordinance. That said property or substation is among the property specified in said lease and covered thereby. It is further agreed that said property or substation is across the Georgia Railway about a half mile from the street being paved under the paving assessment ordinance in question.

Plaintiff offered in evidence "notice of street improvement and the bill for the improvement, headed City of Decatur, Georgia, to Georgia Railway and Power Company, stating that this notice was served the 19th day of June, 1926, which it is admitted was mailed or served on that

date on the Georgia Railway and Power Company," said notice being as follows:

"City of Decatur, Georgia

To Georgia Railway & Power Company, Atlanta, Georgia:

Notice served, this the 19th day of June, 1926.

——— ———, City Clerk. $13,444.66.

Street Improvement Collectors' Office

Decatur, Georgia, June 19th, 1926.

You are hereby notified that your bill for street improvement on East Ponce de Leon Avenue, in Decatur, Georgia, as specified below, is now due, but you are entitled to 10 days notice within which to pay the same to City of Decatur, before it is turned over to the Marshal for collection.

For paving between your tracks and for two (2) feet on each side thereon on East Ponce de Leon Avenue, from East Court Square to Oak Street, $13,444.66."

[fol. 149] Plaintiff "put in evidence by agreement the following:

STIPULATION

It is stipulated and agreed that the street railway line along East Ponce de Leon Avenue and along the street paved under the paving ordinance and assessment ordinance in question was the property of and belonged to the Georgia Railway and Electric Company. The street railway line was owned by the Georgia Railway and Electric Company at the time of the assessment and paving in question and that said property was acquired by the Georgia Power Company under and by virtue of the consolidation of the Georgia Railway and Power Company into the Georgia Power Company under the joint agreement and certificate of incorporation of February 25th, 1927. That said line of the Georgia Railway and Electric Company on, along and upon Ponce de Leon Avenue was being operated by the Georgia Railway and Power Company under and by virtue of the lease of January 1, 1912, at the time of the assessment ordinance and paving of the street in ques-

tion and whatever possession the Georgia Railway & Power Company had of said street railway line and tracks was under and by virtue of said lease. That the said street railway line was part of the property described in the said lease. It is further stipulated that the Georgia Power Company was in possession of the property, levied upon at the time of the levy as set out in paragraph 12 of the petition by virtue of the consolidation of the Georgia Railway & Electric Company and other companies into the Georgia Power Company. The Georgia Railway & Electric Company owned Street Railway lines through various streets into the City of Atlanta and from the City of Atlanta to the City of Decatur, and through the City of Decatur, over which electric street cars were operated; that this property was covered by the lease to the Georgia Railway & Power Company from the Georgia Railway & Electric Company. [fol. 150] That the tracks in the City of Decatur run along East Ponce de Leon Avenue and — known as the North Decatur Line. Said North Decatur Line operated over various tracks belonging to the Georgia Railway & Electric Company and is part of the property covered by the said lease. The Georgia Railway & Power Company operated cars from the center of the City of Atlanta to the City of Decatur and into the City of Decatur and around a loop in the City of Decatur and over East Ponce de Leon Avenue in Decatur and over Hurt Street and along Edgewood Avenue into the City of Atlanta, and operated cars over the same and over other lines and tracks of the street car company and operated by the street car company in Atlanta. At the time the paving was done and at the time of the consolidation of the Georgia Railway & Electric Company and the Georgia Railway & Power Company and other companies into the Georgia Power Company, the Georgia Railway & Electric Company and the Georgia Railway & Power Company were amply solvent.

The plaintiff introduced in evidence, and the same was admited by the court, annual return for taxation as follows:

[fol. 151] Annual Return for Taxation

On the Georgia Railway & Power Company, Lessee, Georgia Railway & Electric Company Street Railroad Company of all property owned by said Company on the January 1, 1925, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said Company.

Cities or towns	Main and side track miles	Value	Value of real estate	Trolley wires and poles and electric overhead and underground construction and steam heat and gas mains	Value of track and real estate, etc.	Value of franchise	Pro rata value personal property	Aggregate value in county
Decatur.....	6.2	81,471	4,500	36,311	122,282	100,699	32,948	255,929

State of Georgia, County of Fulton

Before me personally appeared P. S. Arkwright, President of Georgia Railway & Power Co., Lessee, President of said Company, who, being duly sworn, deposeth and saith that the foregoing statement contains, by items, a true and correct return of all the property owned, controlled or held by or on behalf of said Company therein named, without deducting indebtedness of same on the January 1, 1925, and that the value thereof as stated is its full market value.

(Signed) P. S. Arkwright
President of Georgia Railway & Power Company, Lessee.

Sworn to and subscribed before me,
this 28th day of April, 1925.
(Signed) B. T. Simpson,
Notary Public, Fulton County, Georgia.
My Commission expires Sept. 5, 1926.

[fol. 152] Annual Return for Taxation

On the Georgia Railway and Power Company, Lessee, Georgia Railway & Electric Company, Street Railroad Company of all property owned by said Company on the Jan. 1, 1926, made to the Comptroller-General by the President, in pursuance with law, without deducting the indebtedness of said Company.

Cities or towns	Main and side track miles	Value	Value of real estate	Trolley wires and poles and electric overhead and underground construction and steam heat and gas mains	Value of track and real estate	Value of franchise	Pro rata value personal property	Aggregate value in county
Decatur.....	6,267	81,471	4,500	39,311	125,282	103,067	34,604	262,953

State of Georgia, County of Fulton

Before me personally appeared P. S. Arkwright, Georgia Railway & Power Company, Lessee, President of said Company, who, being duly sworn, deposeth and saith that the foregoing statement, contains, by items, a true and correct return of all the property owned, controlled or held by or on behalf of said company, therein named, without deducting indebtedness of same on Jan. 1, 1926, and that the value thereof as stated is its full market value.

(Signed) P. S. Arkwright
President of Georgia Railway &
Power Company, Lessee.

Sworn to and subscribed before me,
this 7th day of July, 1926.
(Signed) B. F. Simpson
Notary Public, Fulton County, Georgia.
My commission expires Sept. 5, 1926.

[fol. 153] The defendant tendered the following stipulation of facts, and the same was admitted in evidence:

STIPULATION

The street railway line in Decatur on East Ponce de Leon Avenue was built by the Collins Park & Belt Railroad Company and its name was subsequently changed to Atlanta Rapid Transit Company and this line was subsequently conveyed by deed from Atlanta Rapid Transit Company to the Georgia Railway & Electric Company.

The original grant from the City of Decatur to the Collins Park and Belt Railroad Company for construction of the line is as follows:

"Atlanta, Ga. August 26th, 1899.

To the Honorable Mayor and General Council of the City of Decatur, Georgia:

The Collins Park and Belt Railroad Company respectfully petitions your Honorable body to grant to it the right and franchise to construct, electrically equip and operate the following lines of street car tracks over and upon the following streets of the City of Decatur:

Commencing at the city limits of Decatur Street, i. e. the street running along the north side of the Georgia Railroad and extending along said street east as far as Candler Street or the next street east of and parallel to Candler Street; thence along Candler Street or said next street east of and parallel to Candler Street to Sycamore Street; thence west along Sycamore Street to McDonough Street; thence along McDonough Street to a connection with said line petitioned for on Decatur Street or road, with the right to make such sidings and turnouts as may be necessary, and petitioners will ever pray.

Collins Park and Belt Railroad Company, by C. J. Simmons, President.

[fol. 154] September 4th, 1899.

The following ordinance was read by Councilman Patillo, to wit:

Be it ordained, that from and after the passage of this ordinance, that franchises be granted the Collins Park & Belt Railroad Company, to build, electrically equip and

operate an electric street railroad in the Town of Decatur from the western limits on North Railroad Avenue to Oak Street; thence along Oak Street to Broad Street; thence along Broad Street to East Court Square; thence along East Court Street or square to South Court Street or Square thence along South Court or Square to McDonough Street; thence along McDonough Street, to North Railroad Avenue, or to leave North Railroad Avenue at McDonough Street; thence direct along McDonough Street to Court Square; thence east along South Court Square to East Court Square; thence North along East Court Square to Broad Street, or to build, electrically equip and operate an electric street railroad on any of the above named streets. Wherever this route runs along streets already occupied by the track of the Atlanta Railway Company the said track shall be removed and replaced by the Collins Park & Belt Railroad Company and at the latter's expense so that the tracks of the two companies shall be as nearly as possible equally distinct from the sidewalks except at corners.

The tracks of the Collins Park and Belt Railroad Company shall be laid on the south side of Broad Street and west side of McDonough Street from the tracks of the Atlanta Railway Company. The streets shall be left in as good condition except for the tracks as before the tracks were laid, and the tearing up and replacing the streets shall be done under the supervision of the street committee. The Town of Decatur reserves the right to regulate the speed of cars and the right to make all such regulations [fol. 155] as pertain to police power of Decatur. All overhead and other construction shall be done in a reasonably safe manner and the street committee shall see to this, and all matters pertaining to grades shall be subject to the approval of the street committee.

This is the line in question in this suit.

By deed dated March 28th, 1902, the Atlanta Rapid Transit Company conveyed all of its property, together with its different lines of railway to the Georgia Railway & Electric Company."

Stipulation

It is stipulated that the only property owned by the Georgia Power Company in Decatur not devoted to some

public utility service is a stock of goods in a store in Decatur, which stock of goods, consisting of merchandise, is of the value of approximately $2500.00.

It is agreed that the same provisions are contained in the joint agreement of 1930 as were contained in the original one of 1927 so far as set out in the plaintiff's petition. In 1927 a consolidated corporation took in the Georgia Railway & Power Company, Georgia Railway and Electric Company, and various other companies. Subsequently another Georgia Power Company took in the Macon Company. The certificate of incorporation by the Secretary of State was dated June 26th, 1930. The present defendant, Georgia Power Company, is a corporation under the certificate of incorporation of June 26th, 1930. The Georgia Railway and Power Company and Georgia Railway and Electric Company are constituent companies of a former Georgia Power Company. They were constituent companies of the first consolidation of February 25th, 1927. They are not constituent companies of the present Georgia Power Company except in so far as the former Georgia [fol. 156] Power Company became a constituent of the present Georgia Power Company. The original Georgia Power Company is a constituent company of the second Georgia Power Company and the second Georgia Power Company is a constituent of the present corporation Georgia Power Company.

Preston S. Arkwright, a witness for the defendant, having been duly sworn testified on cross-examination as follows:

We run an electric light and power business and run some bus service in Decatur. We do not have any bus property located in Decatur, except the buses run through there. The stock of goods that I spoke of consists of lamps, stoves, refrigerators, things like that. The goods that are there now were not goods that were obtained through the Georgia Railway & Power Company. The store was opened, I think, around 1918, or prior to that time. It was owned and operated by the Georgia Railway & Power Company when it was opened. It does not own the store but the stock of goods. The stock of goods is sold generally to the public like any merchandise. As to whether or not I can say that any part of the stock that was there in 1918 is there now—if I said anything about it, I would say

that none of it was there in 1918. I think it has been sold or possibly thrown away or junked. I would say that none of it that is there now was there in 1925 or 1926. I mean the store now is the store of the Georgia Power Company.

It does not own the building. It is the local office of the company in Decatur. The stock is owned now by the Georgia Power Company. Since February, 1927, it has been owned by the Georgia Power Company.

The present Georgia Power Company was incorporated June 26, 1930; The Georgia Railway and Electric Company was incorporated in 1902, and the Georgia Railway & Power Company was incorporated in 1911.

[fol. 157] [File endorsement omitted.]

ORDER APPROVING BRIEF OF EVIDENCE

The foregoing is approved as a true and correct brief of the evidence in the foregoing stated case, and is ordered filed as a part of the record in said case.

Oct. 14th, 1933.

G. H. Howard, Judge S. C. A. C.

IN SUPERIOR COURT OF FULTON COUNTY

VERDICT

We, the jury, find the issues in favor of the plaintiff and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Co. and Georgia Railway and Power Co. for the collection of said amounts.

This June 21, 1933.

W. C. Bennet, Foreman.

[fol. 158] IN SUPERIOR COURT OF FULTON COUNTY

No. 91639

CITY OF DECATUR

vs.

GEORGIA POWER COMPANY et al.

DECREE—Filed June 26, 1933

The order on the demurrers passed by Judge Thomas in this case to the effect that the plaintiffs would be entitled to a general judgment against the defendants and a decree so moulded as to give the plaintiff a lien by general judgment for said assessment on any property of the defendants wherever located; and after hearing all the evidence, it appearing that the allegations have been established and there being no evidence to the contrary, by direction of the court the jury have found the following verdict.

"We the jury find the issues in favor of the plaintiff, and that the plaintiff is entitled to collect the amount of $13,444.66 with interest thereon from June 21, 1926, at the rate of 7% per annum represented by the fi. fa. set out in the petition and that the plaintiff is entitled to a decree against Georgia Power Company and Georgia Railway & Power Company for the collection of said amounts.

W. C. Bennett, Foreman.

June 21, 1933."

It is therefore considered, ordered and decreed by the court that the issues are hereby decreed in favor of the plaintiff, and that the Georgia Railway & Power Company and the Georgia Power Company are liable to the plaintiff in the amount of the fi. fa. set out in plaintiff's petition, together with legal interest thereon from the date of same, and that the plaintiff do have and recover of the Georgia [fol. 159] Railway & Power Company and the Georgia Power Company the sums of $13,444.66, with interest thereon from June 21, 1926, at the rate of seven (7%) per cent. per annum, to wit: $6,587.84 as interest and —— costs of court.

This the 26th day of June, 1933.

G. H. Howard, Judge Superior Court Atlanta Circuit.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 160] [File endorsement omitted]

[fol. 161] IN SUPREME COURT OF GEORGIA

ORDER ON MANDATE OF SUPREME COURT OF THE UNITED STATES

September 30, 1935.

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GEORGIA POWER CO. ET AL.

v.

CITY OF DECATUR

It appearing from the Mandate of the Supreme Court of the United States that the judgment of this Court in the above stated case has been by said Supreme Court reversed with costs: it is now ordered and adjudged that the judgment of the Supreme Court of the United States be hereby made the judgment of this Court, and that said Mandate be entered upon the minutes of this Court, subject to the power and jurisdiction of this Court to render any judgment not inconsistent with the decision and judgment of the Supreme Court of the United States. And the superior court of Fulton County is hereby ordered to cause judgment to be entered in favor of the plaintiffs in error against the defendant in error for the costs in the Supreme Court of the United States, $421.95, for the costs of transcript of record forwarded to the Supreme Court of the United States, $141.30, and for costs in this Court, $15.00.

The Mandate is as follows:

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Georgia, Greeting:

(Seal.)

Whereas, lately in the Supreme Court of the State of Georgia, before you, or some of you, in a cause between

Georgia Power Company, Georgia Railway & Power Com-
[fol. 162] pany, Georgia Railway & Electric Company, Plaintiffs in Error, and City of Decatur, Defendant in Error, No. 10029, wherein the decree of the said Supreme Court, entered in said cause on the 18th day of September, A. D. 1934, is in the following words, viz.:

"This case came before this court upon a writ of error from the superior court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed,"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-four, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court, in this cause be, and the same is hereby reversed with costs; and that the said plaintiffs in error, Georgia Power Company et al.; recover against the said defendant in error Four Hundred and Twenty-one Dollars and Ninety-five cents for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

April 29, 1935.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Georgia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said appeal notwithstanding.

Witness the Honorable Charles E. Hughes, Chief Justice of the United States, the thirty-first day of May, in the

year of our Lord one thousand nine hundred and thirty-five.

[fol. 163] Costs of plaintiffs in error:

Clerk	$ 96.75
Printing Record	305.20
Attorney	20.00
	$421.95

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

File No. 10029. Supreme Court of the United States. No. 570. October Term, 1934. The Georgia Railway & Electric Company, Georgia Railway & Power Company, and Georgia Power Company vs. City of Decatur. Mandate. Filed in office June 3, 1935. K. C. Bleckley, C. S. C. Ga.

[fol. 164] IN SUPREME COURT OF GEORGIA

No. 10029

GEORGIA POWER COMPANY ET AL.

v.

CITY OF DECATUR

OPINION—September 30, 1935

By the COURT:

1. Where on appeal from this court to the United States Supreme Court the judgment has been reversed and the case remanded to this court for further proceedings, the appeal tolls the term of this court for the case, and this court still has jurisdiction to give such direction and make such disposition of the case as it may deem proper, not inconsistent with the opinion and judgment of the U. S. Supreme Court.

2. The City of Decatur, under the constitution and general law of this State and under its charter and the amendments thereof, had legislative authority to pave its streets

and to assess a portion of the costs of such improvement against the street-railway company occupying and using, with the consent of the city, the street paved, irrespective of benefit to the company. This authority comes both within the taxing and the police power reserved in the State.

3. Where a city, in conformity to legislative authority and its ordinances, paved and incurred the expense of paving a street occupied by a street-railway company, and where the company, with knowledge that the city intended, in conformity to its charter and ordinances, to charge the company with a part of the expense of such paving, stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same, it was thereafter too late for such company to avoid payment on the ground that enforcement of the assessment will deprive the company of its property, in violation of the due-process clauses of the State and Federal Constitutions.

[fol. 165] 4. In a case where a verdict has been directed, and there appears any reason why the verdict was demanded, the judgment will not be reversed, notwithstanding there may have been rulings on the trial that might be erroneous. Any ruling, although wrong, that does not affect the verdict becomes harmless. Another trial will not be ordered when it is manifest that the same verdict and judgment will necessarily result on the second trial.

GRAHAM, Judge:

This case came on writ of error from the superior court of Fulton County, and the judgment was affirmed by this court. Georgia Power Co. v. Decatur, 179 Ga. 471. The Supreme Court of the United States reversed that decision, and remanded the case to us for further proceedings not inconsistent with their opinion. Georgia Power Co. v. Decatur, 79 L. ed. 702. The judgment was reversed because we held that the rejection of testimony offered on the trial, to the effect that the paving in question was of no benefit to the company, was immaterial. By reference to the opinion it appears that the Supreme Court of the United States so held because it construed our decision to hold that our State statute which authorized, and the ordinance which directed, an assessment for the cost of improvements required as the basis of their operation the existence of bene-

fits. In this connection the Supreme Court of the United States said: "As we read its decision, the court below held that the State statute which authorized, and the ordinance which directed, an assessment for the costs of improvements require, as the basis for their operation, the existence of benefits; and the case was dealt with in that view • • • In this court the city insists that under the Georgia law, 'The general rule that assessments against abutting owners for street improvements are sustainable only [fol. 166] to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved.' And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the State to alter or amend charters. If the Georgia statutes had been thus construed by the State Supreme Court, a different question would have been presented. The difficulty, however, is that the court, as we have said, construed the statute as contemplating the existence of benefits to the railway as a basis for the assessment, but required the railway companies to overcome a legislative presumption that such benefits existed by proof of an arbitrary abuse of the legislative authority 'because of no benefit.' By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes a part of the statute as much as though it were found in appropriate words in the text."

We did not mean to so construe our State statutes and the ordinances adopted thereunder, notwithstanding our opinion was so unhappily written as to be open to such construction. At the time the case was before us the plaintiff in error was insisting that the paving assessment was illegal because of no benefit to it. This contention had been previously made. When the city proposed the paving, the power company objected, and offered, unless it was relieved of the burden, to surrender its franchise and remove its tracks from the streets. This offer was declined by the city, and on petition of the city the power company was restrained from abandoning its lines. That judgment was affirmed by both this court and the Supreme Court of the United States. 168 Ga. 705; 262 U. S. 432. The Supreme Court of the United States held that the 5-cent rate fare contract made between the city and the Collins Park Company was still in force and binding on the Georgia Power [fol. 167] Company, that by the contract the city gave its

consent to the use of its streets by the power company, adopted this court's construction of the acts of the legislature and the ordinance and its decision as to the effect of the contract; and further held: "The losses attributable to the stretch of track in question and the 5-cent fare are immaterial while the rate contract continues." Georgia Power Co. v. Decatur, 74 L. ed. 999. Theretofore the United States Supreme Court had held, on an appeal of the power company from a decision of this court: "Where a street-car company has made a binding contract with a municipality for rates, the Supreme Court of the United States will not consider the question whether or not they are confiscatory." Georgia Power Co. v. Decatur, 67 L. ed. 1065. With these decisions in mind, it was our opinion that in view of the contract as to the five-cent fare the attack made upon the paving assessment by the power company because of no benefit was groundless, even assuming that in other circumstances the assessment for the costs of the paving might, as contended by the company have required as the basis of its operation the existence of benefits. Since the lack of benefit was due to the fact that the contract for the low fare rendered the operation of the railway profitless, the testimony offered by the power company on the trial of the case to the effect that the paving was of no benefit to the company was, in our opinion, immaterial to a consideration of the case. However, we did not mean to construe our State statutes in reference to street paving, and the liability therefor on the part of street railways occupying and using the paved street, to require as a basis for their operation the existence of benefits. This court had not in any previous case held that the right to assess the costs of paving streets against street-[fol. 168] railway companies occupying and using the streets rests on benefits from the pavement to the street-railway company. To the contrary this court, in older cases which were binding on us, held that under the Georgia law street-railway companies occupying and using the streets of a municipality with their tracks were compelled, irrespective of benefits to the property, to share the burden of paving and keeping the streets so used in repair. Such was the holding in Georgia Railway & Power Co. v. Atlanta, 153 Ga. 385, and in City of Atlanta v. Gate City Street Railroad Co., 80 Ga. 276. Under the construction which the Supreme Court of the United States understood

this court to place on the laws of this State, to wit, that the right of assessing paving costs against street-railway companies rested on benefits to the companies, that court reversed the judgment on the ground that evidence offered by the power company on the trial, to the effect that the paving was of no benefit to the company, was rejected as immaterial, and remanded the case to this court for further proceedings therein not inconsistent with their opinion.

Now, before the mandate of the Supreme Court of the United States has been made the judgment of this court in the case, the City of Decatur, alleging that we have not construed the right under the Georgia law to make paving assessments against street railway companies using the streets to rest on benefits to the companies, and that the decision of this court, as construed by the Supreme Court of the United States, leaves open and undecided the question whether assessments against street-railway companies for street improvements, in respect to streets occupied by their tracks are sustainable only upon the theory of special benefits to such railway companies, or whether such assessments are sustainable under the police power of the State to alter or amend corporate charters, moves that in [fol. 169] giving further proceeding to the case we pass upon this question, and either affirm or give direction to the lower court in the case accordingly. The power company resists this motion, contending that the question has been decided a-versely to the contention of the city; that in any event this court is without jurisdiction to consider the case further; and that all we can do is to reverse the judgment and remand the case to the lower court for another trial not inconsistent with the opinion of the United States Supreme Court. So it becomes necessary for us to consider the proper construction under the Georgia law of the right to assess the costs of street paving against the street railway using the streets paved, and also what further jurisdiction we may now take of the case.

1. We deal first with the question of jurisdiction. The question is novel in this court. Heretofore we have not been confronted with a similar situation. Ordinarily this court loses jurisdiction of a case with the passing of the term at which it is decided, or with the filing of the remittitur in the case in the court below. After the term at

which the case was decided has adjourned, or after the remittitur has been filed in the court below, this court, under the Code of 1933, § 24-4544, will not entertain any motion for rehearing. This rule has been adhered to by this court. Greene County v. Wright, 127 Ga. 150. The instant case does not come within this rule; it is not a rehearing. Under mandate of the United States Supreme Court it is before us for further proceeding not inconsistent with its opinion. If we were to hold that we have no further jurisdiction of the case, we would be powerless even to alter our decision of affirmance by making the judgment of the United States Supreme Court the judgment of this court. But the case, [fol. 170] under the decision of the United States Supreme Court, is actually before us for disposition at the present term. The appeal of the case tolled its term, and within the sense of the statute the ter[illegible]he court has not yet passed. There is ample authority, both of the higher courts of other states and of the United States Supreme Court, that we may consider and dispose of the case not inconsistent with the opinion of the United States Supreme Court. The following cases support this conclusion: Ward v. Board of Commissioners, 64 L. ed. 751; Schneider Granite Co. v. Gast Realty &c. Co., 62 L. ed. 292; Harding v. Harding, 83 Pac. 434; Kinzell v. Chicago &c. R., Idaho, (190 Pac. 255); Ettor v. Tacoma, 77 Wash. 267 (137 Pac. 820); Goodtitle v. Kibbe, 1 Ala. 403; Gibson v. Chanteous, 50 Mo. 85; Simonson v. Monson, 36 S. D. 245 (153 N. W. 1020); St. Louis &c. R. v. McWhirter, 155 Ky. 301 (159 S. W. 796).

If we should hold that we have no authority to give any direction other than to send the case to the lower court to be tried not inconsistently with the opinion of the United States Supreme Court, it would mean that we held that this court construed the right to pave the street, and to assess a reasonable portion of the cost thereof against a street-railway company occupying and using the street with its tracks, to require under our law, as its basis, special benefit to the railway company, and that the United States Supreme Court was correct in so construing our opinion of our law; whereas such is not the construction we intended to place upon our law in such cases. It would mean that the Georgia Power Company in this case might evade the payment of the assessment for which, according to the facts of the case under our law as we construe it, the

company is liable, and might enable it to avoid the payment of this obligation on the false theory that we construe the right to make the pavement and assessment therefor to rest on benefit to the company Our jurisdic-
[fol. 171] tion is not so circumscribed as to forbid a consideration and hence a disposition of the case under a proper construction of the law. It would strain our law to force a termination of the case on a construction of the law which was not intended and which is not in accord with previous decisions of this court. Our practice is founded too much in reason and common sense to say we have made a mistake in language which we cannot correct while yet the case is before us, or that we are impotent with the case in our hands to correct our opinion which appears to have been so inaptly written that it fails to express its true intent and meaning. It is within the power of courts, on motion of a party or on their own motion, to correct and amend their judgments to make them correspond with the findings of the court. Hence we hold as to this case that the term of the court has not passed, that we have jurisdiction to consider the case, revise our opinion to make it conform to its true intent and meaning, and give further direction not inconsistent with the opinion of the Supreme Court of the United States. Such is in conformity to the former practice of this court, and that of the Court of Appeals of this State, in Hall v. Slaton, 172 Ga. 675, where the case was nonsuited in the trial court. The Court of Appeals (38 Ga. App. 619), reversed the judgment on the construction that the Alabama courts placed on the law applicable to the case. This court (169 Ga. 710), reversed the judgment of the Court of Appeals on its application of the construction of the courts of Alabama to the law of the case, which ruling meant an affirmance of the judgment of the trial court unless the Court of Appeals gave further consideration and direction to the case. It went back from this court to the Court of Appeals after the term when it was decided by the Court of Appeals had passed. The Court
[fol. 172] of Appeals further considered the case (40 Ga. App. 288), and revised its decision so as to conform to the opinion of this court, but instead of affirming the judgment, gave an additional reason why the nonsuit should not have been granted, adhered to its judgment

of reversal, and ordered another trial. See also 4 C. J. 1220, § 3270.

2. Now let us consider the proper construction to be placed on the Georgia law authorizing pavement of the street in question, and the assessment of part of the cost thereof against the power company occupying and using the street with its street-cars and tracks. When the Georgia Power Company was organized and chartered, the general law of the State, enacted under the State constitution, in reference to street and interurban railways expressly stipulated: "Provided that no street-railroad or interurban railroad incorporated under this chapter shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities; and provided further that all railroad companies incorporated under this chapter shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them with reference to the railroad or the properties thereof located within the limits of said municipal corporation." Code of 1933, § 94-1002. The City of Decatur was duly incorporated by act of the General Assembly. By legislative acts approved August 18, 1919, and August 12, 1924, (Ga. L. 1919, p. 934; 1924, p. 534), amending the charter of the City of Decatur, the General Assembly of this State conferred full power and authority upon the city, in the discretion of its commissioners, to pave any street therein, and, when street-railway tracks are located in a street ordered paved, to assess the cost of paving of that portion of the street [fol. 173] between and for two feet on each side of said tracks against the company owning the tracks, and to assess the remainder of such costs against the abutting property. When the Georgia Power Company accepted its charter and with the consent of the city entered on its streets with its railway-tracks, it did so subject to the general law of the State and to the power of the State to amend the city charter by further legislation dealing with the upkeep of the streets. Under its laws the State reserves the power and authority to withdraw, alter, or amend private charters. Under the laws of this State this legislation was authorized. The Code of 1933, § 79-101,

provides: "Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations." And "In all cases of private charters granted since January 1, 1863, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter." §.22-1202.

So when the Georgia Power Company was organized and with the consent of the city entered on the streets with its railway-tracks, it did so subject to the general law of the State and the power of the State to amend the city's charter by further legislation with respect to the upkeep of the streets. Atlantic Gulf R. Co. v. State, 98 U. S. 359 (25 L. ed. 185); West End & Atlanta Street R. Co. v. Atlanta Street R. Co., 49 Ga. 151; Fort Smith Light &c. Co. v. Board of Improvement, 274 U. S. 387 (71 L. ed. 1112); Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379; Sioux City Street Ry. Co. v. Sioux City, 138 U. S. 98 (34 L. ed. 898); Union Branch R. Co. v. E. T. & G. R. Co., 14 Ga. 327. The acts are not in violation of the provision of the con- [fol. 174] stitution of this State (art. 1, sec. 4, par. 1), to the effect that "no special law shall be enacted in any case for which provision has been made by an existing law," and that, "No general law affecting private rights shall be varied in any particular case by special legislation." Weed v. Savannah, 87 Ga. 513. Under ordinances duly adopted by the city under the authority of its charter aforesaid, the street in question was paved and the cost assessed accordingly against the power company as owner of the tracks in the street.

There is no question as to the regularity of the assessment under the general law of the State, and the charter of the city as amended, and the ordinances duly enacted thereunder. It has already been determined that the paving was done and that the assessment therefor was made in conformity to the law. Payment therefor is undertaken to be avoided by the power company on the ground that the pavement was of no benefit to the company. It has been held by this court, in construing the law of the State in reference to street paving and cost thereof, that a street railway could not defend against the payment on the ground of no benefit. In Georgia Railway & Electric Co.

v. Atlanta, 144 Ga. 722, it was held that "a street railway-company which owns a right of way on the side of a street in a municipality, which right of way is 30 feet wide and is occupied by a double track, is not exempt from assessment for a sanitary sewer in the street on which it abuts, on the ground that the railway company cannot receive any benefit from the improvement so long as its property is subjected to the present use."

In Speer v. Athens, 85 Ga. 49, this court in dealing with sidewalk and street assessments, quoting from Cooley's "Taxation," declared: "The power to determine when a [fol. 175] special assessment shall be made and on what basis it shall be apportioned is wisely confided to the legislature. It is not left to juries whenever a property-owner resists an assessment to say that the taxing power has abused its discretion. Such a construction applied to tax cases would work a thorough and radical change in the principles on which taxation is supposed to rest. It would cripple the legislative power and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve, to review and possible reversal at the hands of a jury. To make the juries the assessors of the claims of the State upon the individuals could only introduce anarchy; one jury reaching one conclusion regarding the public needs and another another * * * If anything can be regarded as settled in the municipal law of this country, the power of the legislature to permit such assessments and to direct an apportionment of the cost of frontage should by this time be considered as no longer open to controversy."

In Hayden v. Atlanta, 70 Ga. 817, wherein it was questioned that the legislature of this State had authority by amendment to its charter to authorize the City of Atlanta to grade, pave, and improve its streets and to assess the costs of the improvement against the abutting real estate, this court held that such assessment was not such exercise of the tax power of the city as to require same to be uniform and ad valorem, that it was not taking private property for public use without compensation, but it was the exercise of governmental powers by a municipality which is part of the government of the State, and is part of the police power of the State conferred on the city. It was

also held, which is the law of the State, that every person in this State owes a duty to work the public roads, and [fol. 176] it is in the power of the legislature, representing the public, to compel the performance of this duty. In this connection this court said: "Every person in this State owes a duty to the public to work the public roads and highways, and it is in the power of the legislature, representing the public, to compel a performance of this duty, and it may confer upon municipal corporations this power; it is also competent to authorize these corporations to have the work done on the public streets and thoroughfares of the various municipalities of this State in such manner, by pavements, crossings, drains, and curbings, as may be necessary, and to compel the owners of real estate fronting thereon to pay the costs and expenses of such improvements. There is nothing in the constitution of this State or of the United States to prevent this being done. I can see no reason why the legislature may not force every person to work on the public roads and highways, and perform such service in proportion to the land that such person may own lying on such roads. If this power exists under the constitution of this State, why cannot the State make the improvements itself and assess the landowners to pay for the same? This is but the exaction of a duty the person owes the public; and in the case before us the power conferred by the legislature on the City of Atlanta, and the exercise of that power by the city to make these improvements and to assess and collect the cost of the same from the property owner, is the exercise of governmental powers by a municipality which is a part of the State government; it is, under the circumstances, the same as if done by the State itself. Again, it is a part of the police power of the State conferred on this city. To have sewers is to provide for the health of the people of the city; to have well paved streets and sidewalks is to afford reasonable accom-odation to the public; also, the means [fol. 177] for fire engines to reach the scene of conflagration; all these things are for the public benefit. The blessings conferred by these improvements are shared by the owners of the property assessed in a greater degree than the general public; but whether this was so or not, the power resides in the State, and the legislature may by law confer upon municipal corporations the right to make

these improvements and to assess the property fronting on the streets thus improved, for the cost of the same. * * * But the power to have worked, opened, repaired, and improved the public highways, streets, and roads may be exercised by the legislature in such manner and way and under such circumstances as may be deemed best. There is no limitation imposed by the constitution upon this power; it rests upon the sound discretion of the legislature. Salus populi suprema lex." See Georgia Railway & Electric Co. v. Decatur, 29 Ga. App. 653. Under statutes and ordinances similar to those under consideration, the City of Atlanta brought a mandamus proceeding against the Georgia Railway & Power Company to compel the company to repave a street between its tracks and for a reasonable distance on each side. The mandamus was granted and that judgment was affirmed by this court. Georgia Railway & Power Co., v. Atlanta, 153 Ga. 335.

While it is not expressed in so many words, yet this case necessarily turned on this court construing the law of this State to mean that irrespective of benefits the duty rested on the railway company to bear its portion of the burden of Keeping the streets in proper condition. The court declared: "But in ascertaining the full extent of the liability of the railway company in regard to the matters here involved where the statutes and contracts do not cover all phrases of the question, we can take into consideration the inherent and implied duties of the railway [fol. 178] company which occupies with its tracks a portion of the streets of the city. * * * When street-railway companies occupy portions of streets, such portions are no longer in the free, unincumbered, and exclusive use of the public, but to the company is given not only concurrent but a superior right to use them, and with this right goes a corresponding responsibility." This case under its facts and circumstances necessarily hinged on this court construing the law of this State to mean, that, irrespective of benefits or the absence thereof to the company, the duty rested on the railway company to bear its just share of the burden as fixed by the statute of keeping the streets in proper condition. Such was the holding of this court in City of Atlanta v. Gate City Street Railroad Co., 80 Ga. 276. Assessments for local improvements such as street paving and sewerage are not taxes within the meaning that

taxes must be ad valorem and uniform, yet they are an exercise of the taxing power and also come within the police power of the State. Georgia R. &c. Co. v. Decatur, 137 Ga. 537; City Council of Augusta v. Augusta-Aiken Ry. &c. Cor., 150 Ga. 529; City of Brunswick v. Gordon Realty Co., 163 Ga. 636; Hayden v. Atlanta, supra. Under the general law of this State, the amendments to the city charters, and the ordinances adopted thereunder, the City of Decatur had the legislative authority under the police and taxing power of the State and the right to amend city charters, irrespective of benefit or want of benefit to the street-railway company occupying and using its streets with its railway tracks, to order the paving and to make the assessment against the company. This conclusion is supported not alone by the opinion of the courts of this State, but also by the authority of other States and by the Supreme Court of the United States. See decisions of that [fol. 179] court cited above, and Durham Public-Service Co. v. Durham, 261 U. S. 149.

3. It is not our purpose to hold, where the legislative authority is manifestly abused, that such would not be the subject of inquiry by the court. While it was not in point or necessary to determine the case, this court stated, in City of Atlanta v. Gate City Street Railroad Co., supra, as follows: "We do not intend to decide that, where the city exercises this great power in an arbitrary manner and without sufficient reason, in a proper case made the jury may not consider the necessity for the improvement, or its unreasonableness, or whether the improvement is to be made out of such costly material as may result to the great injury of the citizen owning the property along the street * * *. And while the city may exercise its legislative discretion as to when the improvement shall be made and the material with which it may be made, yet it is for the jury to determine under all the facts whether the same is reasonable or whether there be a necessity therefor." The court did not in this case expressly hold that even where the city arbitrarily exercises its legislative authority such would be a subject of inquiry by the courts; yet it may be assumed as a sound principle that where the legislative authority is manifestly abused by the city, the same would be inquired into by the courts in a proper case made. For instance, a

case that might be a proper subject for such inquiry may be imagined. Suppose the street had just been paved and the railway company had paid its just portion of the cost of the paving, and the city were to decide to repave it out of marble or more costly material, such would appear to be that manifest abuse of the legislative authority as to bring it within the inquiry of the court. In the case before us, however, no such contention is made. The question made, that the paving is of no benefit to the company, when con- [fol. 180] sidered under the law applicable to paving assessments against street-railway companies, does not come within the rule that it may be subject to the inquiry of the courts.

4. We do not herein take issue with the Supreme Court of the United States. We would not circumvent its opinion. Its decision is binding on us. To our minds it is evident from its opinion that if that court had not construed our opinion as placing the right to pave and assess therefor street-railway companies on benefit to the company, it might not have reversed the judgment. In this connection, as hereinbefore recited, that court stated: "In this court the city insists that under Georgia Law 'the general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved,' and seeks to sustain the assessment as an exercise of the police power and the alleged power of the State to alter or amend corporate charters. If the Georgia statutes had been thus construed by the State Supreme Court, a different question would be presented." And then the court proceeded to reverse the judgment on the idea that we construed the Georgia statute as contemplating the existence of benefits to the railway as a basis for the assessment. So we reach the conclusion that had that court understood us to construe the right to pave and make assessment therefor against the street railway to be within the police and taxing power of the State, and not to depend on benefit to the company, it might not have reversed the judgment. We were dealing with the case, as hereinbefore stated, on the theory that the defense based on lack of benefit, even if such was the basis of the right to make the assessment, was in-

[fol. 181] sufficient. Hence we were inadvertent in the language used. So, we repeat, our courts had never held, and we did not mean to hold, that the right to make paving assessments against a street-railway company using the street with its tracks rested on benefit to the company. But the construction placed upon our statute by our courts heretofore and the construction we place upon the same is that the City of Decatur, under the State constitution, the general laws of the State, the police and taxing power of the State, and under the right of the State to amend city charters, had the legislative authority, without regard of benefit to the company, to pave the street occupied and used by the company with its tracks, and to assess the portion of the costs assessed against the company. With the ambiguities removed from our opinion and our construction of our law made clear, it is manifest the judgment should be affirmed, and that this holding is not inconsistent with the opinion of the Supreme Court of the United States in the case.

5. There is another cause, not inconsistent with the opinion of the United States Supreme Court, why the judgment of the lower court should be affirmed. The direction of the verdict was demanded. The paving in question was commenced in May, 1925, and completed in May, 1926. While the street-railway company protested against the pavement and threatened to abandon its line on account of same, yet it took no legal steps to prevent the paving. "Where a city has jurisdiction and power to make a contract for street improvements, and such contract is illegal for some reason, due to irregularity or illegality in the exercise of the power conferred upon the city, no assessment can be levied and enforced against the owners of abutting property, if they act promptly in attacking the illegal contract before the improvements have been made; but if the [fol. 182] owners of abutting property wait until the improvements have been made by the contractor and they have received the benefits thereof, they will be estopped from attacking the illegality of the assessment upon the ground that the contract under which the improvements were made was illegal, the illegality not arising from lack of jurisdiction or power to make the contract under which the improvements were made, but from an illegal exercise of such jurisdiction or power. A mere protest against street improvements, or a mere threat to take legal proceed-

ings to prevent such improvements, is not sufficient to defeat such estoppel. Where such estoppel is operative it will be enforced at law or in summary proceedings, as well as where parties are seeking affirmative relief in equity against the enforcement of assessments for street improvements." Bower v. Bainbridge, 168 Ga. 617. "After the mayor and general council, on the report of its street committee, finally adopts an ordinance establishing a taxing district for a proposed improvement, and providing for the improvement, and the same is not stopped by injunction or other legal process, then the owners will be concluded from further objecting thereto, either as to the form in which the work is done, or the map made, or any other technicality connected therewith; and when such owners do not take steps to enjoin such ordinance or the assessments levied on their property until the improvement has been practically completed, and the city has expended a large sum in making the improvement, relying upon such assessments to meet the expense, they will be precluded and estopped from attacking such assessments upon the grounds, (a) that the collection thereof will deprive them of their property in violation of the due process clauses of the State and Federal constitutions, and (b) that the levy of such assessments has been made in an arbitrary and unreasonable manner." Avery v. Atlanta, 163 Ga. 591. At the time of the paving, [fol. 183] which was done in accordance with the law, the street railway was being operated by the Georgia Railway & Electric Company. This company stood by and without any legal action permitted the paving and the expense thereof to be incurred, with knowledge that the city intended to hold it liable for a portion of such expense. Thereupon the paving assessment became a binding obligation upon the company. Afterwards this company merged into the Georgia Power Company, which company in the merger assumed to pay all assessments outstanding against the electric company. It is now too late to raise the question that the city abused its legislative discretion in ordering the paving and making the assessment for the costs thereof. The Georgia Power Company is estopped, by reason of the laches of the Electric Company in the premises, from making the defense offered against the payment of the assessment. This conclusion is in line with numerous decisions of this court. Raines v. Clay, 161 Ga. 574; Cochran

v. Thomasville, 167 Ga. 579; Mayor &c. of Milledgeville v. Brown, 168 Ga. 1; Bass v. Milledgeville, 180 Ga. 156 (178 S. E. 529).

6. It would seem useless to send the case back to the lower court for another trial, which, if tried in accordance with the proper construction of the law of this State, would necessarily result in a verdict for the city. May we here suggest that if we are wrong in our construction of the case, our judgment herein is open to further review and correction by the Supreme Court of the United States.

7. The decision heretofore rendered by this court in the case of Georgia Power Co. v. Decatur, 179 Ga. 471, is hereby so modified as to make clear the intention of this court as [fol. 184] expressed in the foregoing opinion.

Judgment affirmed. Beck, P. J., and Gilbert, Bell, and Hawkins, JJ., concur. McLaughlin J., dissents.

CONCURRING OPINION

GILBERT, Justice, concurring specially:

I concur in the result reached, but not in all that is said in the opinion. On the question whether this court has jurisdiction to render any judgment other than to make the judgment of the United States Supreme Court the judgment of this court, my concurrence is restricted to the facts in this case. It would seem to be wiser so to limit the language in this respect that the ruling will not furnish a precedent for extending the jurisdiction. Legislation, rather than judicial construction, may be found necessary.

DISSENTING OPINION

MCLAUGHLIN, Judge, dissenting:

I cannot agree with the learned gentlemen that this court has any jurisdiction in this case. The judgment having been reversed by the Supreme Court of the United States,

the appropriate procedure, in my opinion, would be to make the judgment of that court the judgment of this court.

[fol. 185] IN SUPREME COURT OF GEORGIA

JUDGMENT—September 30, 1935

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

GEORGIA POWER CO. et al.

v.

CITY OF DECATUR

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All th Justices and Judges concur, except Judge McLaughlin, who dissents. Justice Gilbert concurs specially.

Bill of costs, $15.00.

[fol. 186] IN SUPREME COURT OF GEORGIA

[Title omitted]

PETITION FOR APPEAL—Filed Nov. 21, 1935

Petition for Appeal from the Supreme Court of the State of Georgia to the Supreme Court of the United States

To the Honorable Marcus W. Beck, Presiding Judge of the Supreme Court of the State of Georgia. (The Hon. Richard B. Russell, Chief Justice of said Court, being disqualified.):

Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, your petitioners, respectfully show:

1. Petitioners were plaintiffs in error in the above stated case and are appellants in this petition for appeal.

2. The above named City of Decatur was defendant in error in the above stated case and is the appellee in this petition for appeal.

3. The above named appellee filed a complaint in the Superior Court of Fulton County, State of Georgia, on November 17, 1931, in which suit they sought to recover a personal judgment against the Georgia Railway & Power [fol. 187] Company, Georgia Railway & Electric Company and the Georgia Power Company for a special improvement paving assessment against the Georgia Railway & Power Company. The petition alleged that the Georgia Power Company was a consolidated corporation, chartered by the Secretary of the State of Georgia in 1927, under the laws of the State of Georgia, and particularly under Sections 2607, et seq., of the 1926 Code of the State of Georgia; and is composed of certain constituent corporations, among them being the Georgia Railway & Power Company and Georgia Railway & Electric Company.

Said special improvement paving assessment was made under and by virtue of legislative acts of the State of Georgia giving the City of Decatur the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against property owners and street railway companies. (Ga. Laws 1919, pp. 934, et seq. and Ga. Laws 1924, pp. 534, et seq.) Each of the appellants demurred to the petition and moved to dismiss it upon the grounds that the petition of appellee did not set out sufficient facts to entitle the City of Decatur to the relief sought; that it (the City of Decatur) was not entitled to a personal judgment against appellants; and upon the further ground that if said statutes be so construed as to entitle the City of Decatur to the relief sought and to a recovery against appellants in the case at bar, that then said statutes would deprive appellants of the equal protection of the law and of the due process of law, and confiscate appellants' property in contravention of the Fourteenth Amendment of the Constitution of the United States, and would be invalid and unconstitutional.

[fol. 188] Appellants filed an answer to the petition brought by the City of Decatur raising the federal and constitutional questions similar to those raised in its demurrer to the petition, and setting out therein that neither appellants nor their property had received any benefits from

the special paving improvement for which the assessment had been made and which forms the basis of the present action.

The motion to dismiss the petition and the demurrer were overruled, and timely exceptions were taken to the said decision.

The case proceeded to trial and the trial court excluded all of the evidence offered by appellants showing an entire absence of benefits to appellants and appellants' property from the paving improvement for which the assessment was made. After the exclusion of all of the evidence tendered and offered by appellants, a verdict and judgment was directed in favor of the appellee, in the sum of $13,444.66, together with interest from the 21st day of June 1926.

The various questions raised by the demurrer and the answer, as to the constitutionality of said acts, were duly taken to the Supreme Court of the State of Georgia. There was likewise taken to said Court for review the rulings of the trial court holding that as to street railway companies and appellants, testimony showing an entire absence of benefits from the paving improvement, was irrelevant and immaterial.

The appeal from the various judgments, rulings and decrees of the Superior Court of Fulton County were carried [fol. 189] to the Supreme Court of the State of Georgia (the highest court of said State), and the judgment, rulings and decision of the lower court were affirmed by the said Supreme Court of the State of Georgia on the 18th day of September 1934.

4. In said cause there was drawn in question the validity of the legislative acts of the State of Georgia, giving appellee, the City of Decatur, the right to improve and reimprove its streets and make assessments for such improvements and reimprovements against street railway companies and appellants (and other property owners), (Ga. Laws 1919, pp. 934, et seq. and Ga. Laws 1924, pp. 534, et seq.) on the ground that said statute as construed and enforced against appellants was repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprived appellants of the equal protection of the law and the due process of law, and confiscates appellants' property in contravention of said cons-itutional

amendment. The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said Act. (Said decision is reported in 179 Ga. 471-490.)

5. By appeal petitioners duly carried the said decision of the Supreme Court of the State of Georgia to the Supreme Court of the United States for review.

The Supreme Court of the United States sanctioned said appeal and on April 29, 1935, the Supreme Court of the United States rendered a decision in said case and ordered that "the decree of the court below must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion." (The opinion as ren- [fol. 190] dered by the Supreme Court of the United States has not as yet been printed in any of the official reports of said court.)

Without any change in the record in said case, and notwithstanding the decree of the Supreme Court of the United States rendered in said case, the Supreme Court of the State of Georgia on the 30th day of September 1935, rendered a decision affirming the former judgment rendered by it in said case.

Petitioners say that the judgment and decision of the Supreme Court of the State of Georgia, rendered on the 30th day of September 1935, was erroneous in that:

(a) It was not in compliance with the opinion of the Supreme Court of the United States as rendered in said case.

(b) It was not in compliance with the mandate, decree and praecipe of the Supreme Court of the United States issued upon the same record, in that the decree of the Supreme Court of the United States was that the decree of the Court below must be reversed, whereas, the decision of the Supreme Court of the State of Georgia, as rendered on the 30th day of September 1935, was one of affirmance.

(c) The decree and judgment of the Supreme Court of the United States was that the cause be remanded "for further proceedings not inconsistent with the foregoing opinion", and the decision and judgment of the Supreme Court of the State of Georgia was not in compliance with the opinion as rendered in said case by the Supreme Court of the United States.

[fol. 191] (d) The Supreme Court of the State of Georgia failed and refused to give effect to the opinion, decision and judgment of the Supreme Court of the United States as rendered in said case.

6. Petitioners further represent that the judgment and decision of the Supreme Court of the State of Georgia (rendered on the 30th day of September 1935) was further and additionally erroneous in holding that said legislative acts, as construed in its said decision and as enforced against appellants, were valid and constitutional and not in violation of the equal protection and due process provisions of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, petitioners pray for the allowance of an appeal from said decision of the Supreme Court of the State of Georgia (rendered on the 30th day of September 1935) (the highest court of said State) to the Supreme Court of the United States, in order that the decision of the Supreme Court of the State of Georgia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Georgia, may be sent to the Supreme Court of the United States, as provided by law.

Petitioners, desiring the appeal to be a supersedeas, pray an order touching the security to be required of them, and the approval of such bond as required in this case.

[fol. 192] The errors upon which your petitioners claim to be entitled to an appeal are those above indicated and more fully set out in the assignment of errors filed herewith.

This 21st day of November 1935.

Walter T. Colquitt, Colquitt, MacDougald, Troutman & Arkwright, Attorneys for Petitioners and Proposed Appellants.

[fol. 192½] [File endorsement omitted.]

[fol. 193] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 21, 1935

The said Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, Appellants, assign the following errors in the record and proceedings in said case:

1. The opinion, judgment and decree of the Supreme Court of the State of Georgia, (the highest Court of said State) rendered on the 30th of September, 1935, was erroneous in that it was inconsistent with the opinion, judgment, mandate and pr-ecipe issued upon the same record and in the same case by the Supreme Court of the United States on the 29th of April, 1935.

2. The opinion, judgment and decree of the Supreme Court of the State of Georgia rendered on September 30, 1935 was erroneous in that it failed to give binding effect to the decision, opinion, judgment and pr-ecipe rendered and issued upon the same record and in the same case by the Supreme Court of the United States on April 29, 1935, and in that it did not give effect to the said opinion of the Supreme Court of the United States as the law of the case according to the mandate issued by said court to the Supreme Court of the State of Georgia.

3. The opinion, judgment and decree of the Supreme Court of the State of Georgia, rendered on the 30th of September, 1935, was erroneous in that the further proceedings had in the said Supreme Court of the State of [fol. 194] Georgia were inconsistent with the opinion, judgment, mandate and pr-ecipe rendered and issued upon the same record in the same case by the Supreme Court of the United States, as follows:

(a) The mandate of the Supreme Court of the United States ordered a reversal.

The judgment and decree of the Supreme Court of the State of Georgia was an affirmance.

(b) The opinion of the Supreme Court of the United States was that the Georgia assessment statutes in question

contemplate "the existence of benefits to the railway company as the basis for the assessment."

The Supreme Court of the State of Georgia failed and refused to follow said opinion and decision as the law of the case.

(c) The opinion and decision of the Supreme Court of the United States held that the existence of benefits resulting from the paving improvement in question was a material and relevant issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company had the constitutional right to introduce pertinent evidence and proof to overcome a rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question and the improvement assessment ordinances made thereunder, and that the failure and refusal of the lower court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived the said Companies of the due process of law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

[fol. 195] The Supreme Court of the State of Georgia denied the said Companies the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question.

(d) The opinion and decision of the Supreme Court of the United States held that under the Georgia statutes and ordinances, authorizing and making assessment for the paving improvement in question against the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, without any compensating advantage was and is an arbitrary abuse of power amounting to the confiscation of the property of said companies in contravention of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Georgia failed and refused to give force and effect to said opinion and decision and did not accept and follow it as the law of the case.

(e) The mandate of the Supreme Court of the United States was that "the decree of the court below must be re-

versed and the cause remanded for further proceedings not inconsistent with the foregoing opinion."

The Supreme Court of the State of Georgia without remanding said case to the trial court for a hearing; without any order purporting to grant a re-hearing of said case in the Supreme Court of the State of Georgia; without change of the record in the case carried to said Court, and without notice to the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, entered a judgment of affirmance in said case.

[fol. 196] 4. The decision and judgment of the Supreme Court of the State of Georgia rendered on September 30, 1935, holding that under the charter amendments of the City of Decatur (Ga. Laws 1919, p. 934 et seq. and Ga. Laws 1924, p. 534, et seq.) legislative authority had been conferred upon said municipality to pave its streets and to assess a portion of the cost of such improvement against street railway companies occupying the street improved irrespective of benefits to the street railway company and that this authority comes both within the taxing and police power reserved in the State, was erroneous:

(a) In failing to accept and follow, as the law of the case, the construction of said statutes as set out in the opinion of the Supreme Court of the United States, rendered in said case.

(b) The said construction sought to be placed on said legislative acts (Ga. Laws 1919, p. 934 et seq. and Ga. Laws 1924, p. 534 et seq.) would render said statutes unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that said statutes, as thus construed, would deny to appellants, and each of them, the equal protection of the law and the due process of law as therein guaranteed, and confiscate the property of appellants in contravention of said Constitutional amendment, upon each of the following grounds:

(1) As against all other parties, the improvement assessments made under said legislative acts, must be based upon special benefits accruing to particular property affected thereby. As against street railway companies, and appellants in the instant suit, the paving assessment need not be based upon special benefits accruing to particular property

affected thereby, nor upon benefits accruing to the owners of such property.

[fol. 197] (2) As against all other parties, such improvement assessments cannot exceed the special benefits accruing to particular property specially benefited thereby, but as against street railway companies, and appellants, such assessment can exceed not only the special benefits resulting to the particular property affected thereby, but also all special benefits whatever resulting to the property owner.

In said suit there was drawn in question the validity and constitutionality of said statutes of the State of Georgia, and the decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes, as construed in said opinion of September 30, 1935, which decision is hereby assigned as error.

5. The decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, construed the Georgia Legislative amendments to the charter of the City of Decatur (Ga. Laws, 1919, p. 934 et. seq. and Ga. Laws 1924, p. 534 et seq.) and municipal ordinances passed thereunder as not requiring any benefits to street railway companies or to any street railway company's property and as depriving street railway companies, and appellants, of any right to have the question of benefits, or the entire lack of benefits, presented, heard, passed upon or determined in any judicial hearing, and made the action of the municipality conclusive with reference to improvement assessments made against street railway companies. The said decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said Georgia Legislative Acts, as thus construed, and said decision is hereby assigned as error upon each of the following grounds:

[fol. 198] (a) In failing to accept and follow, as the law of the case, the construction of said statutes as set out in the opinion of the Supreme Court of the United States, rendered in said case.

(b) Said construction of said Georgia Legislative Acts renders said Legislative Acts unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to Appellants, and each

of them, the equal protection of the law and due process of law as there guaranteed. Such construction of the said Legislative Acts and municipal ordinances passed thereunder makes the action of the municipality conclusive upon street railway companies and Appellants and deprives them of the right of a judicial hearing on the question of the confiscation of their property; the entire lack of benefits, and on the question of the excessive amount of improvement assessment made against Appellants.

The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes and ordinances, as thus construed, and said decision is hereby assigned as error.

In said suit there was drawn in question the validity and constitutionality of said statutes of the State of Georgia (Ga. Laws 1919, p. 934, et seq. and Ga. Laws 1924, p. 534 et seq.) and ordinances passed thereunder, on the grounds that said statutes were repugnant to the Fourteenth Amendment of the Constitution of the United States, in that they deny to Appellants, and each of them, the equal protection of the law and the due process of law as therein guaranteed.

[fol. 199] 6. The Supreme Court of the State of Georgia, in its opinion and decision rendered on the 30th of September, 1935, held that the failure of Appellants to take legal action to prevent or to enjoin the municipality from constructing the paving improvement in question, and its failure to enjoin the paving assessment made by the municipality, estops Appellants from pleading the illegality and unconstitutionality of the assessment made against them in a suit at law brought for the collection of the amount of the assessment. The said decision was erroneous upon each of the following grounds:

(a) There was no pleading nor evidence in said case raising the question of estoppel.

(b) Appellants were given no hearing and no opportunity to be heard with reference to estoppel. All testimony and evidence tendered by Appellants on the question of their liability was excluded, resulting in a denial of due process of law violative of the Fourteenth Amendment of the Constitution of the United States.

(c) The said decision was not in conformity with the decision of the Supreme Court of the United States rendered in said case on April 29, 1935, in which the Supreme Court (upon the same record as that before the Georgia Supreme Court) held that the refusal of the lower court to receive and consider proof and evidence offered by Appellants with reference to a lack of benefits, was in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

(d) The Georgia Legislative statutes (Ga. Laws 1919, p. 934, et. seq. and Ga. Laws 1924, p. 534 et seq.), under which the paving improvements were constructed, and under which assessment therefor was sought to be made against Appellants, as construed by the decision of the Supreme Court of the State of Georgia, prevented Appellants from [fol. 200] going into a Court of Equity to enjoin the improvements from being made by the municipality by giving the parties against whom an assessment was made the right, in a legal action, to set up the defense that the whole or any part of the amount of such assessment was not due. The Georgia Court therefore erred in holding that Appellants were estopped from denying that they owed said municipality the whole or any part of the assessment sought to be enforced against it.

(e) Georgia Laws (Ga. Laws 1919 p. 934 et. seq. and Ga. Laws 1924 p. 534 et seq.) provide that a party against whom an improvement assessment is made under said Acts may, in a legal proceeding brought to enforce said assessment, contest the whole or any part of the amount of the assessment.

Under the decision of the Supreme Court of the State of Georgia said provision of said statutes prevents a party against whom an assessment is made from having the right to enjoin the construction of the improvement and the issuance of an assessment execution therefor.

To the action brought against Appellants by the municipality to collect the amount of the improvement assessment in question, Appellants set up the defense that it did not owe the whole or any part of said assessment and that said assessment would deprive Appellants of its property in violation of the due process clause of the Fourteenth

Amendment to the Constitution of the United States. The Georgia Supreme Court in denying the Companies the right to set up its defense to said suit construed the statutes in question so as to deprive Appellants of the right to a judicial hearing as to whether they owe the whole or any part of the assessment. Said statutes, as thus construed, are unconstitutional in that Appellants are deprived of the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that such construction of the statutes denies Appellants the right to any judicial determination as to its liability for improvement assessments.

[fol. 201] 7. The opinion, judgment and decree of the Supreme Court of Georgia, rendered on September 30, 1935, was erroneous because said opinion, judgment and decree denied to petitioner the equal protection of the law and due process of law and is therefore violative of Section 1, Article 14 of the Constitution of the United States, in that said opinion, judgment and decree denied appellants the right to introduce evidence in said cause on the material issue in said cause or to challenge the fact of its liability or the amount of its liability for the assessment sought to be collected in said case.

8. The opinion, judgment and decree of the Supreme Court of Georgia, rendered on September 30, 1935, is erroneous because said Court held that appellants are estopped by laches from challenging its liability for the paving assessment sought to be enforced against it in said cause, either on the ground that the enforcement of the assessment will deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or as to the fact or amount of liability, as appellants did not institute a legal action to prevent the street improvement and the assessment against them or their property but waited until the paving was completed and the assessment made and execution issued therefor before calling into question appellants' liability. Said decision is erroneous:

(a) The Acts of the Legislature of Georgia under which the assessment in question was made provide for a hearing on the fact of the liability or the amount thereof after

the paving is completed, the assessment made, and an execution issued to collect the assessment. (Georgia Laws 1919, page 934 et seq. and Georgia Laws 1924, pages 534 et seq.)

[fols. 202-210] (b) As a matter of law and under the said provisions of said Acts, (as repeatedly construed by the decisions of the Supreme Court of Georgia) neither appellants nor any other single property owner can maintain an action to prevent the paving of the streets by a municipality upon the sole ground that such person or his property is not or would not be liable for an assessment therefor, nor could appellants or any other single property owner maintain such an action to determine in advance its liability or the amount for which it or its property will be liable for assessment.

(c) In the instant case appellants adopted the only course open to them to determine whether or not they were liable for said assessment, in whole or in part.

The said opinion, judgment and decree of the Supreme Court of the State of Georgia is so arbitrary, so unreasonable, and so without any support in law as to constitute a denial to appellants of the equal protection of the law and due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

For which errors appellants pray that the said judgment of the Supreme Court of the State of Georgia, dated September 30th, 1935, in the above-entitled cause, be reversed and a judgment rendered in favor of the said appellants.

This the 21st day of November, 1935.

Walter T. Colquitt, Colquitt, MacDougald, Troutman & Arkwright, Attorneys for Appellants.

[fol. 210½] [File endorsement omitted.]

[fols. 211-215] Supersedeas and cost bond on appeal for $1,000.00, approved and filed Nov. 21, 1935, omitted in printing.

[fol. 216] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER ALLOWING APPEAL—Filed Nov. 21, 1935

The petition of Georgia Railway & Electric Co., Georgia Railway & Power Co. and Georgia Power Company for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Georgia, and the assignment of errors filed therewith, and the statement disclosing basis of jurisdiction of the Supreme Court of the United States and the record of said cause having been considered,

It is ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Georgia, as prayed in said petition, and that the clerk of the Supreme Court of the State of Georgia shall prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty days from the date hereof.

It is further ordered that the said Georgia Railway & Electric Co., Georgia Railway & Power Co., and Georgia Power Company shall give good and sufficient security in the sum of One Thousand and no/100 ($1,000.00) Dollars, [fols. 217 & 218] that said appellants shall prosecute said appeal to effect, and if said appellants fail to make their plea good, they shall answer all damages and costs.

The said appellants now presenting a bond in the sum of One Thousand and no/100 ($1,000.00) Dollars, with The Ætna Casualty & Surety Co. of Hartford, Connecticut, as surety, it is

Ordered that the same be and is hereby approved.

The appeal shall operate as a supersedeas.

This 21st day of November 1935.

Marcus W. Beck, Presiding Justice of the Supreme Court of the State of Georgia. (Chief Justice of said court being disqualified.)

[File endorsement omitted.]

[fol. 219] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 21, 1935

To the Clerk of the Supreme Court of the State of Georgia:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following:

1. The entire transcript of the record in the case from the superior court of Fulton County to the Supreme Court of the State of Georgia.

2. The judgment, opinion and decree of the Supreme Court of the State of Georgia, rendered on the 30th day of September, 1935.

3. This præcipe and service thereon.

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court and to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, D. C., on or before thirty (30) days from the date of this præcipe.

This 21st day of November, 1935.

Walter T. Colquitt, Colquitt, MacDougald, Troutman & Arkwright, Attorneys for Appellants.

[fol. 220] Service of the above præcipe accepted and acknowledged.

This 21st day of November, 1935.

James A. Branch, Branch & Howard, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 221] IN SUPREME COURT OF GEORGIA

[Title omitted]

NOTICE OF PRÆCIPE—Filed Nov. 21, 1935

To Messrs. Branch & Howard, Attorneys for City of Decatur, Appellee:

Please take notice that on the 21st day of Nov., 1935, the undersigned filed with the clerk of this court a præcipe for the record to be transmitted to the Supreme Court of the United States on the appeal allowed in the above cause, a copy of which præcipe is hereby served upon you as attorneys for appellee.

This 21st day of November 1935.

Walter T. Colquitt, Colquitt, MacDougald, Troutman & Arkwright, Attorneys for Appellants

Service of the above notice of præcipe acknowledged. All other and further services waived.—Nov. 21st, 1935.

Branch & Howard, J. A. Branch, Attorneys for Appellee.

[File endorsement omitted.]

[fols. 222 & 223] Citation, in usual form, showing service on James A. Branch, filed Nov. 21, 1935, omitted in printing.

[fol. 224] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRÆCIPE FOR ADDITIONAL PORTIONS OF THE RECORD—Filed Nov. 26, 1935

To the Clerk of the Supreme Court of the State of Georgia:

In making up the transcript of the record to be filed in the Supreme Court of the United States, pursuant to an

appeal allowed in the above entitled cause, you will please incorporate the following additional portions of the record not requested by the appellants, viz:

(1) The motion on behalf of the City of Decatur filed in the above stated cause in the Supreme Court of the State of Georgia on June 3rd, 1935, together with the acknowledgment of service thereon dated May 24th, 1935.

(2) This præcipe and service thereon.

James A. Branch, Branch & Howard, Attorneys for City of Decatur, Appellee.

Service of the foregoing præcipe accepted and acknowledged. This the 26th day of November, 1935.

Walter T. Colquitt, Colquitt, MacDougald, Troutman & Arkwright, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 225] IN SUPREME COURT OF GEORGIA

[Title omitted]

MOTION FOR FURTHER CONSIDERATION—Filed June 3, 1935

To the Honorable the Supreme Court of Georgia:

The City of Decatur, defendant in error in the above stated cause, respectfully presents this motion and shows to the Court the following:

1

This motion is filed after the mandate of the Supreme Court of the United States in the above stated cause has been returned and before the same has been made the judgment of this Court and while the cause is pending in this Court.

2

The Supreme Court of the United States (by the majority decision, from which three of the Justices dissented) on April 29th, 1935, reversed the judgment of this Court, rendered September 18th, 1934, affirming the judgment of

the superior court of Fulton County. The judgment of the Supreme Court of the United States remands the cause "for further proceedings not inconsistent with" the majority opinion.

3

In said opinion, the Supreme Court of the United States held that the judgment of this Court was erroneous for the reason, and solely for the reason, that this Court had held that the ruling of the trial court in excluding evidence to the effect that the street improvement in question did not benefit the street car property of the plaintiffs in error was [fol. 226] not erroneous and did not deny plaintiffs in error due process of law in contravention of the fourteenth amendment. This ruling of the Supreme Court of the United States was based solely upon the fact that that Court construed the decision of this Court as holding that the statutes amending the charter of the City of Decatur (Georgia Laws 1919, page 934 et seq., and Georgia Laws 1924, page 534 et seq.) authorizing the assessment against street railways of a portion of the cost of paving the streets occupied by the tracks of such companies, are sustainable only upon the theory of special benefits to such street railway property from such paving. In said majority opinion, the Court held:

"As we read its decision, the court below held that the state statute which authorized, and the ordinance which directed, an assessment for the cost of improvements require, as the basis for their operation, the existence of benefits; and the case was dealt with in that view. * * * In this Court, the city insists that, under Georgia law, 'The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved.' And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the state to alter or amend corporate charters. If the Georgia statutes had been thus construed by the State Supreme Court, a different question would be presented. The difficulty, however, is that the court, as we have said, construed the statute as contemplating the existence of benefits to the railway as a basis for the assessment, but required the railway com-

panies to overcome a legislative presumption that such benefits existed by proof of an arbitrary abuse of the legislative authority 'because of no benefit.' By that construc-
[fol. 227] tion we are bound, and in accordance with it must consider and determine the case."

4

Movant respectfully points out to this Court that the decision of this Court in this cause, as construed by the Supreme Court of the United States, leaves open and undecided a question which was involved and which is controlling; namely, the question whether assessments against street railway companies for street improvements, in respect of streets occupied by their tracks, are sustainable only upon the theory of special benefits to such railway companies; or whether such assessments are sustainable under the police power and the power of the State to alter or amend corporate charters.

5

On the trial of the case in the court below, and in this Court, movant contended that the assessment was valid and sustainable, not under the general rule applicable to abutting property, but upon the well established and recognized rule that as to street railway companies, occupying with their tracks portions of public streets, the legislature has the power to make reasonable classifications and to impose different burdens; and that under the provisions of the law of Georgia contained in section 2600 of the Code of 1910 (now section 94-1002 Code of 1933) street railway companies are "subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time" by the towns or cities in which they operate. The decision of this Court, as construed by the majority decision of the Supreme Court of the United States, did not pass upon and settle this question. This question, which is controlling in the case, is still undecided.

[fol. 228] 6

Movant respectfully points out that the final determination of the case will be governed and controlled by the

decision of this question. Therefore the question should be passed upon and the case be finally disposed of by this Court or be remanded to the superior court of Fulton County with directions from this Court on this question so that the case may be tried in the superior court in accordance with the law of Georgia on this subject.

7

Movant is advised that this Court now has the power and authority to pass upon and decide this controlling question, and movant respectfully represents to the Court that it would be in the interest of justice for the question to be settled by this Court at this time. The assessment in question was made in the year 1926, and the questions of its validity and whether the defendants (plaintiffs in error) can be compelled to pay it, have been before this Court numerous times. Movant respectfully urges that the Court now pass upon the question which the majority of the Supreme Court of the United States holds is still undecided, in order that there may be a final determination of the question whether the plaintiffs in error are liable for the payment of the assessment or whether they are to be relieved of it upon the contention that their property was not specially benefited.

A brief in support of this motion is presented herewith.

Respectfully submitted, Branch & Howard, Bond Almand, Scott Candler, Attorneys for City of Decatur, Defendant in Error and Movant. Branch & Howard, 839 Hurt Building, Atlanta, Georgia.

[fols. 229-239] Due and legal service of the within motion acknowledged. Copy received.

This the 24th day of May, 1935.

Colquitt, Parker, Troutman & Arkwright, Attorneys for Plaintiffs in Error.

[File endorsement omitted.]

[fol. 240] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 241] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed Dec. 9, 1935

Come now Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, the appellants in the above entitled cause, and adopt their assignments of error as their statement of the points to be relied upon, and state that the whole of the record, as filed, is necessary for the consideration of the case.

This the 27th day of November, 1935.

Walter T. Colquitt, Colquitt, MacDougald, Troutman & Arkwright, Counsel for Appellants.

Service of the within and foregoing statement of the points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged. Copy received. All other and further service and notice waived.

This the 27th day of December, 1935.

Jas. A. Branch, Branch & Howard, Counsel for City of Decatur, Appellee.

[fol. 242] [File endorsement omitted.]

Endorsed on cover: File No. 40,179. Georgia Supreme Court. Term No. 625. Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, appellants, vs. City of Decatur. Filed December 9, 1935. Term No. 625, O. T. 1935.

FILE COPY

Office Supreme Court, U. S.
FILED
DEC 9 1935
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 625

GEORGIA RAILWAY & ELECTRIC COMPANY,
GEORGIA RAILWAY & POWER COMPANY,
AND GEORGIA POWER COMPANY,
Appellants,

vs.

CITY OF DECATUR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

WALTER T. COLQUITT,
Counsel for Appellants.

COLQUITT, MACDOUGALD, TROUTMAN &
ARKWRIGHT,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
That the decision of the Supreme Court of the State of Georgia rendered on September 30, 1935, was not in conformity with the opinion and mandate rendered by the Supreme Court of the United States in this case on April 29, 1935	1
The decision of the Supreme Court of the State of Georgia rendered on September 30, 1935, denied appellants the right to introduce evidence on a material issue in the cause and denied it the right to be heard to challenge the fact of appellant's liability or the amount of their liability for the paving assessment in question, and this was in contravention of the due process clause of the Federal Constitution	5
That the Georgia statutes in question, as construed and enforced against appellants in the decision rendered by the Supreme Court of Georgia on the 30th day of September, 1935, were repugnant to the Fourteenth Amendment to the Constitution of the United States	6

Table of Cases Cited.

Dubuque & Pacific Rd., Ex Parte, 1 Wallace 69	2
Durant v. Essex Company, 101 U. S. 555	2
Gaines v. Rugg, 148 U. S. 228	3
Georgia Railway & Electric Co. v. City of Decatur, 79 L. Ed. 702	6
Horkan v. City of Moultrie, 154 Ga. 444	6
Kansas City Sou. R. Co. v. Road Imp. Dist., 256 U. S. 658	7
Mackall v. Richards, 116 U. S. 45	2
Mayor & Council of Gainesville v. Dean, 124 Ga. 750	5
Mayor, etc., of Washington v. Moseley, 41 Ga. App. 439	5
Norwood v. Baker, 172 U. S. 269	7
Potts, In re, 166 U. S. 263	3
Rice v. Mayor & Council of Macon, 117 Ga. 401	5
Road Improvement Dist. #1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188	7
Sanford Fork & Tool Co., In re, 160 U. S. 247	2
Saunders v. Shaw, 244 U. S. 317	6
Sibbald v. United States, 12 Peters 489	2
Standard Pipe Line Co. v. Miller County Highway Dist., 277 U. S. 160	7
The "Lady Pike", 96 U. S. 461	2
Thomas v. Kansas City Sou. R. Co., 261 U. S. 481	7
Union Steamboat Co., Ex Parte, 178 U. S. 317	2, 3
Washington Bridge Co. v. Stewart, 3 Howard 413	2

Page

Washington & Georgetown R. R. Co., In re, 140 U. S. 91 7
Wright v. Mayor & Council of Macon, 117 Ga. 504 5

STATUTES CITED.

Act of Congress of February 13, 1925, amending Section 237 of the Judicial Code (28 U. S. Code Ann. 344) 7
Act of Congress of January 31, 1928 7
Act of Congress of April 26, 1928 7
"Commentaries on the Constitution of the United States," Story, Volume 1, page 59 2
Constitution of the United States, 14th Amendment 4, 6
Georgia Laws, 1919, pages 934 et seq 4, 5, 6
Georgia Laws, 1924, pages 534, et seq 4, 5, 6

SUPREME COURT OF THE STATE OF GEORGIA

OCTOBER TERM, 1935.

No. 10029

GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY, AND GEORGIA POWER COMPANY, PLAINTIFFS IN ERROR,

(*Appellants*),

vs.

CITY OF DECATUR, DEFENDANT IN ERROR,

(*Appellee*).

APPELLANTS' STATEMENT DISCLOSING BASIS OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

The jurisdiction of the Supreme Court of the United States is invoked upon the grounds:

First. That the decision of the Supreme Court of the State of Georgia rendered on September 30, 1935, was not in conformity with the opinion and mandate rendered by

the Supreme Court of the United States in this case on April 29th, 1935.

A second appeal to this Court is the proper procedure to have said question considered, passed upon and determined by this Court.

Ex Parte Union Steamboat Co., 178 U. S. 317, 318, 319.

See also:

The "Lady Pike," 96 U. S. 461, 462.
Sanford Fork & Tool Co., 160 U. S. 247, 255.

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any "other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. • • •

"If the special mandate directed by the 24th section, is not obeyed or executed, then the general power given to 'all the courts of the United States, to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th Section of the Judiciary Act, fairly arises, and a mandamus, *or other appropriate writ, will go.* 1 Story, 59." (Italics ours.)

Ex Parte Sibbald v. *United States*, 12 Peters 489, 492.
Washington Bridge Co. v. *Stewart*, 3 Howard 413, 425.
Ex Parte Dubuque & Pacific Rd., 1 Wallace 69, 73.
Durant v. *Essex Company*, 101 U. S. 555.
Mackall v. *Richards*, 116 U. S. 45.
In Re Washington & Georgetown R. R. Co., 140 U. S. 91.

Gaines v. *Rugg*, 148 U. S. 228.
In Re Potts, 166 U. S. 263.
Ex Parte Union Steamboat Co., 178 U. S. 317.

By appeal this case was before the Supreme Court of the United States, and on the 29th of April, 1935, said Court rendered an opinion and decision therein and its mandate and præcipe issued to the Supreme Court of the State of Georgia directed that "the decree of the court below must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion."

On the 30th of September, 1935, in the same case and on the same record that was before the Supreme Court of the United States, the Georgia Supreme Court rendered a decision which was not in conformity with the opinion and mandate issued by the Supreme Court of the United States.

The decision of the Supreme Court of the State of Georgia rendered on September 30, 1935, and the further proceedings in said Court, were inconsistent with the opinion, judgment and mandate issued in said case by the Supreme Court of the United States, as follows:

(a) The mandate of the Supreme Court of the United States ordered a reversal.

The judgment and decree of the Supreme Court of Georgia was an affirmance.

(b) The opinion of the Supreme Court of the United States was that the Georgia assessment statutes in question contemplate "the existence of benefits to the railway company as the basis for the assessment."

The Supreme Court of the State of Georgia failed and refused to follow said opinion and decision as the law of the case.

(c) The opinion and decision of the Supreme Court of the United States held that the existence of bene-

fits resulting from the paving improvement in question was a material and relevant issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States, the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company had the constitutional right to introduce pertinent evidence and proof to overcome a rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question and the improvement assessment ordinance made thereunder, and that the failure and refusal of the lower court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived the said Companies of the due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of Georgia denied the said Companies the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question.

The amount involved in the case at bar is sufficient to bring this case to the Supreme Court of the United States by appeal.

The case at bar was a civil one in which the appellee (City of Decatur) sought to recover of appellants the sum of $13,444.66, with interest from the 31st of June, 1926, on a special improvement paving assessment made against appellants under Georgia Laws 1919, pages 934 *et seq.* and Georgia Laws 1924, pages 534 *et seq.*

Second. The decision of the Supreme Court of the State of Georgia rendered on September 30, 1935 denied appel-

lants the right to introduce evidence on a material issue in the cause and denied it the right to be heard to challenge the fact of appellants' liability or the amount of their liability for the paving assessment in question, and this was in contravention of the due process clause of the Federal Constitution.

Georgia Laws 1919, pages 934 *et seq.*, and Georgia Laws 1924, pages 534 *et seq.* (under which the paving assessment in question was made against appellants) set out the only procedure open to appellants to determine whether or not they were liable for said assessment in whole or in part.

Said Acts provide:

> "Provided that the defendant in such execution shall have the right to file an affidavit denying that the whole or any part of the amount of such execution is due, and stating what he admits to be due, if any, which amount so admitted to be due shall be paid before the affidavit shall be received, the said affidavit to be filed with the marshal of said city and when received shall be returned by him to the Superior Court of DeKalb County, and there tried and the issue determined as in cases of illegality, subject to all the penalties provided by law in cases of illegality for delay."

Under decisions of the Supreme Court of Georgia, said provision prohibits a property owner from going into court to prevent the municipality from constructing the paving improvement in question and from contesting the fact or amount of liability until the assessment execution is sought to be enforced against the property owner.

Rice v. *Mayor & Council of Macon,* 117 Ga. 401.
Wright v. *Mayor & Council of Macon,* 117 Ga. 504.
Mayor & Council of Gainesville v. *Dean,* 124 Ga. 750.
Mayor, etc., of Washington v. *Moseley,* 41 Ga. App. 439; 442.

A property owner is not entitled to be heard in advance upon the fact or the amount of the liability, or the question of benefits or confiscation resulting from the assessment.

Horkan v. *City of Moultrie,* 154 Ga. 444; 449; 450.

Appellants adopted the only course open to them to determine whether or not they were liable for the paving assessment in question, in whole or in part. The decision rendered by the Supreme Court of Georgia on September 30, 1935 denied appellants the right to introduce evidence, and denied them the right to a judicial hearing as to the fact or the amount of appellants' liability in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Saunders v. *Shaw,* 244 U. S. 317, 319.

Georgia Railway & Electric Co. v. *City of Decatur,* — U. S. —; 79 L. Ed. 702, 705.

Third. That the Georgia statutes in question, as construed and enforced against appellants in the decision rendered by the Supreme Court of Georgia on the 30th of September, 1935 were repugnant to the Fourteenth Amendment to the Constitution of the United States.

The validity of the statutes of the State of Georgia, under which the special improvement paving assessment against appellants was made, (Ga. Laws 1919, pp. 934 *et seq.* and Ga. Laws 1924 pp. 534 *et seq.*) were drawn in question upon the ground that they were unconstitutional and repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deprived appellants of the equal protection of the law and the due process of law and confiscate appellants' property in contravention of said Constitutional provisions.

In its decision rendered on September 30, 1935, the Supreme Court of Georgia held in favor of the Constitution-

ality of said Acts. The decision of the Supreme Court of Georgia, in favor of the Constitutionality of the said Georgia statutes, brings the case at bar within the jurisdictional provisions of the Act of Congress of February 13, 1925, wherein Section 237 of the Judicial Code was re-enacted (U. S. Code Ann., Title 28, Sec. 344) and the Acts of Congress of January 31, 1928 and of April 26, 1928, heretofore referred to.

Kansas City Sou. R. Co. v. *Road Imp. Dist.*, 256 U. S. 658.

See also:

Thomas v. *Kansas City Sou. R. Co.*, 261 U. S. 481.

Norwood v. *Baker*, 172 U. S. 269.

Road Improvement Dist. #1 of Ark. v. *Missouri Pac. R. Co.*, 274 U. S. 188.

Standard Pipe Line Co. v. *Miller County Highway Dist.*, 277 U. S. 160, 162.

By Act of Congress of January 31, 1928, "the writ of error in cases civil and criminal is abolished." Said Act provides that all relief which could heretofore be obtained by writ of error shall hereafter be obtained by appeal.

The Act of April 26th, 1928 made the former statutes relating to right of writ of error applicable in cases of appeal provided for in the Act of January 31, 1928.

The Act of February 13th, 1925, defining the jurisdiction of the Supreme Court of the United States and re-enacting Judicial Code Section 237 (U. S. Code Ann. 344), provides:

> "A final judgment or decree in any suit in the highest court of a State in which the decision in the suit can be had * * * where is drawn in the question of the validity of a statute of any state, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its valid-

ity, may be reviewed by the Supreme Court upon a writ of error."

The decision of the Supreme Court of the State of Georgia sought to be reviewed, was rendered on the 30th of September, 1935 and the application for appeal from said decision to the Supreme Court of the United States is presented the 21st day of November, 1935.

Respectfully submitted,

WALTER T. COLQUITT,
COLQUITT, MACDOUGALD, TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE SUPREME COURT OF GEORGIA.

WALTER T. COLQUITT,
COLQUITT, MacDOUGALD,
TROUTMAN & ARKWRIGHT,
Attorneys for Appellants.

SUBJECT INDEX

Pages

Decision of Supreme Court of State of Georgia, rendered on September 30, 1935, was not in conformity with the opinion and mandate rendered by the Supreme Court of the United States in this case on April 29, 1935... 1

Decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, denied appellants the right to introduce evidence on material issue and denied them the right to be heard to challenge the fact of their liability or the amount of their liability for the paving assessment in question, said denial being in contravention of the Due Process Clause of the Constitution of the United States..... 6

The Georgia Statutes, in question, as construed and enforced against Appellants in the decision of the Supreme Court of Georgia on September 30, 1935, were repugnant to the Fourteenth Amendment to the Constitution of the United States..... 11

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

	Pages
Ansley v. Glendenning, 56 Ga. 286	9
Bostwick v. Brinkerhoff, 106 U. S. 3	4
Cotton Mill v. Social Circle, 163 Ga. 465	9
City of Commerce v. Southern Railway Co., 35 Fed. (2d) 331	13
City of Barree v. Barree Chelsa Railway Co., 123 Atl. 427	13
Clark v. Willard, 292 U. S. 112	3
Clark v. Willard, 294 U. S. 211	3
Daniel v. Rosenheim, 152 Ga. 278 (2)	9
Durant v. Essex Company, 101 U. S. 555	7
French v. Barber Asphalt Paving Co., 181 U. S. 324	12
Gainesville v. Dean, 124 Ga. 750	9
Gulf Refining Co. v. United States, 269 U. S. 125	4
Georgia Rwy. Co. v. Decatur, 262 U. S. 432	4
Gaines v. Rugg, 148 U. S. 228	5, 7
Georgia Rwy. & Elec. Co. v. City of Decatur, 295 U. S. 165	6, 7
Georgia Power Co. v. City of Decatur, 168 Ga. 705	8
Hart v. Lagaron, 46 Ga. 396	9
Hitchcock v. Culver, 107 Ga. 184 (2)	9
Hartford Life Ins. Co. v. Blincoe, 255 U. S. 129	2
Haseltine v. Central Bank, 183 U. S. 130	4
Hickman v. Fort Scott, 141 U. S. 415	7
In Re Sanford Fork & Tool Co., 160 U. S. 247	4
Lanham v. Rome, 136 Ga. 398	9
Matthews v. Gelders, 129 Ga. 103 (2)	9
McKnight v. Craig's Administrator, 6 Cranch 183	7

	Pages
Metropolitan Co. v. Kaw Valley Drainage Dist., 225 U. S. 519	4
Mutual Life Ins. Co. v. Hill, 193 U. S. 551	2
Nashville, C. & St. L. Rwy. Co. v. Walters, 294 U. S. 405, 79 Law Ed. 458	13
Norfolk Turnpike Co. v. Oyster Comm'n., 226 U. S. 99	4
O'Brien v. Wheelock, 184 U. S. 430	11
Park v. Callaway, 128 Ga. 119 (4)	9
Regenstein v. Atlanta, 98 Ga. 170	9
Rice v. Macon, 117 Ga. 401	9
Road Imp. Dist. No. 1 of Ark. v. Missouri-Pacific Rwy. Co., 274 U. S. 188	13
Road Imp. Dist. No. 1 of Ark. v. Missouri-Pacific Rwy. Co., 2 Fed. (2d) 340	13
Rooney v. McCall, 128 Ga. 249 (2)	9
Russell v. O'Dowd, 48 Ga. 475 (3)	9
Saunders v. Shaw, 244 U. S. 317	7, 11
Schell v. Dodge, 107 U. S. 629	5
Seabold v. United States, 12 Peters 488	5
Schlosser v. Hemphill, 198 U. S. 173	4
Schneider Granite Co. v. Gast Realty & Invest. Co., 245 U. S. 288	3
Smith v. Murphy, 140 Ga. 80	9
United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660	13
Washington Bridge Co. v. Stewart, 3 Howard 413	4
Waycross v. Cowart, 164 Ga. 721	9
Williams v. Kennedy, 134 Ga. 339 (1)	9
44 Corpus Juris, "Municipal Corporations" pp. 534, Section 2896	13

IN THE

Supreme Court of the United States

GEORGIA RAILWAY & ELECTRIC CO.,
GEORGIA RAILWAY & POWER CO., and
GEORGIA POWER COMPANY,
Appellants,

v.

CITY OF DECATUR,
Appellee.

No. 625
October Term,
1935.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE DECISION OF THE SUPREME COURT OF GEORGIA.

In accordance with Rule Seven (3) of the Supreme Court of the United States, appellants file this brief in opposition to the motion of the Appellee.

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

First: That the decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, was not in conformity with the opinion and mandate rendered by the Supreme Court of the United States in this case on April 29th, 1935.

Where such an issue is raised, the Supreme Court of the United States not only has jurisdiction, but it alone can determine and settle the question.

In the decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, the Court said:

> "May we suggest that if we are wrong in our construction of the case, our judgment herein is open to further review and correction by the Supreme Court of the United States."

The dissenting opinion in said case stated:

> "The case having been reversed by the Supreme Court of the United States, the appropriate procedure, in my opinion, would be to make the judgment of that Court, the judgment of this Court."

The decisions of the Supreme Court of the United States, cited and relied upon by Appellee, show that this Court in each instance granted a second appeal (or second certiorari or second writ of error) so that it could after argument and a full and complete hearing determine for itself whether the subsequent proceedings in the State court were in conformity with its opinion and mandate.

For instance:

In *Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129, 134, a second appeal was allowed by this court and the court held that those matters which were actually considered and decided by this court were foreclosed.

In *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 553, a second appeal, or certiorari, was granted. In that case the court held:

> "Hence, the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of

any other than the question discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case."

In *Schneider Granite Co. v. Gast Realty & Investment Co.*, 245 U. S. 288, a second appeal was granted by this court so that this court could determine whether the State court had followed the opinion and mandate rendered by it when the case was first before it on appeal.

In *Wolff Packing Co. v. Court of Industrial Relations (Kans.)*, 267 U. S. 552, a second appeal was allowed. The court held: "judgment of reversal is not necessarily an adjudication by the appellate court of any other than the question in terms discussed and decided." The questions which were discussed and decided in the opinion rendered by the Supreme Court of the United States were conclusive.

In *Clark v. Willard*, 292 U. S. 112, the Supreme Court of the United States held that it took jurisdiction of the case and in reversing the decision of the State court remanded it to the State court with direction to determine certain questions. (See page 129 of said decision.) This case was again before the Supreme Court of the United States on writ of certiorari. (*Clark v. Willard*, 294 U. S. 211).

In the case at bar the Supreme Court of the United States did not refer the case back to the State court for a reconstruction by it of the Georgia statutes in question. In its decision this court recognized and stated the principle of law that it accepted the construction placed upon said statutes by the Supreme Court of the State of Georgia. It then expressly held what said construction was and said decision became the law of the case.

The opinion, judgment, decree and mandate of the Supreme Court of the United States, which it issued to the lower court, is the judgment of the court irrespective of the fact that there may be a dissent by members of the court.

The decision rendered by the majority is as effective as if all of the Judges had concurred therein.

Washington Bridge Co. v. Stewart, 3 Howard 413, 425.

Durant v. Essex Company, 101 U. S. 555, 556.

The direction to proceed consistently with an opinion of the court has the affect of making the opinion a part of the mandate, as though it had been therein set out at length.

Metropolitan Co. v. Kaw Valley Drainage Dist., 225 U. S. 519, 523.

Gulf Refining Co. v. United States, 269 U. S. 125, 135.

No question, once considered and decided by this court, can be re-examined at any subsequent stage of the same case.

In Re Sanford Fork & Tool Co., 160 U. S. 247, 259. (See cases there cited.)

See also:

Washington Bridge Co. v. Stewart, 3 How. 413, 425.

Durant v. Essex Company, 101 U. S. 555,556.

This court only has jurisdiction over a final decision of a State court.

Bostwick v. Brinkerhoff, 106 U. S. 3, 4;

Haseltine v. Central Bank, 183 U. S. 130;

Schlosser v. Hemphill, 198 U. S. 173, 175;

Norfolk Turnpike Co. v. Oyster Comm'n, 226 U. S. 99, 101;

Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437;

Gulf Refining Co. v. United States, 269 U. S. 125, 135, 136.

When upon appeal from such decision, this court holds that the State court construed State statutes in a certain way, its decision with reference to that question is final and will not be altered, changed or reversed by this court after the term in which its said decision has been rendered.

Seabold v. United States, 12 Peters, 488, 492;

Schell v. Dodge, 107 U. S. 629.

To give the Supreme Court of Georgia the power to review said decision of the Supreme Court of the United States and hold that the Supreme Court of the United States had erred, would give the State court greater power and jurisdiction over the decisions of this court than this court itself will exercise.

The appeal raising these questions comes within the exclusive jurisdiction of this court. We respectfully submit that the appeal should not be dismissed nor the opinion of the Supreme Court of Georgia be affirmed without affording appellants a full hearing on the questions involved.

The mandate of the United States Supreme Court directed a judgment of reversal by the Supreme Court of the State of Georgia. The Georgia Supreme Court had no power or authority, on the same record, to render a judgment of affirmance.

Hickman v. Fort Scott, 141 U. S. 415;

Durant v. Essex Co., 101 U. S. 555;

McKnight v. Craig's Administrator, 6 Cranch, 183.

See also:

Gaines v. Rugg, 148 U. S. 228, 239, 240; 241-244.

The judgment of the United States Supreme Court was a judgment reversing the judgment of the Supreme Court of Georgia and the mandate directed that Court to reverse

its former judgment. The Georgia Supreme Court did not accept a reversal in accordance with the judgment of this Court, but it in effect granted a rehearing and reversed not its own judgment, but the judgment of the Supreme Court of the United States.

We respectfully submit that the motion to dismiss the appeal or affirm the decision of the Supreme Court of Georgia upon the ground that they have followed the mandate of this Court is without merit:

> **Second: The decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, denied appellants the right to introduce evidence on material issues in the cause and denied them the right to be heard to challenge the fact of appellants' liability or the amount of their liability for the paving assessment in question.**

Appellants claim that such denial was and is in contravention of the due process clause of the Federal Constitution. This raises a Federal question for consideration and determination by this court.

> *Georgia Rwy. & Elec. Co. v. City of Decatur*, 295 U. S. 165.
>
> *Saunders v. Shaw*, 244 U. S. 317, 319.

The decision of the Supreme Court of Georgia that as the Company (appellants) "stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same, it is therefore too late for such company to avoid payment on the ground that enforcement of the assessment therefor will deprive the company of its property, in violation of the due process clauses of the State and Federal Constitutions," was erroneous:

(a) It was not in accord with the mandate issued by the Supreme Court of the United States.

In *Georgia Railway & Electric Company v. Decatur*, 295 U. S. 165, this court held that the refusal of the State court to permit appellants to introduce evidence was in contravention of the due process of law clause of the Federal Constitution, and reversed the judgment of the Supreme Court of Georgia. Again disallowing appellants the right to introduce evidence, and upon the same record, the Supreme Court of Georgia renders a judgment of affirmance, and not one of reversal, as directed by this court. Such judgment was erroneous for it was not in accordance with the opinion, decision and mandate of this court.

Hickman v. Fort Scott, 141 U. S. 415;

Durant v. Essex Co., 101 U. S. 555;

McKnight v. Craig's Administrator, 6 Cranch, 183.

See also:

Gaines v. Rugg, 148 U. S. 228, 239, 240; 241-244.

(b) There were no pleadings or evidence in the case to show or sustain the decision of the Supreme Court of Georgia on the theory of an estoppel.

Appellants' evidence which this court held the State Court erred in rejecting, would have affirmatively shown that appellants were not estopped from establishing the fact that its property would be confiscated in violation of the due process clause of the Federal Constitution.

To deny appellants the right to introduce evidence establishing such fact is a denial of due process of law.

Saunders v. Shaw, 244 U. S. 317;

Georgia Rwy. & Elec. Co. v. Decatur, 295 U. S. 165.

(c) Appellants were denied the only remedy, course or procedure allowed or permitted it under the special assessment statutes in question.

This fact is shown by the former litigation between the parties in the case at bar.

When the City of Decatur was about to pave the street under the special paving assessment statutes in question, appellants notified the City of Decatur that it would and could receive no benefit from the paving and that therefore no legal or valid assessment could be made against appellants. Appellants offered and tendered to the City of Decatur its street railway franchises and property located within the municipality. By resolution, the City of Decatur refused the tender and brought a suit in the Superior Court of DeKalb County to compel appellants to continue street railway operation within the municipality. In answer to said suit appellants pleaded and contended:

First: That its municipal franchise to operate in Decatur had expired.

Second: Appellants also pleaded the contentions and defenses which they set up in the case at bar.

With reference to this second defense of appellants, the City of Decatur successfully contended that such questions could not be raised until after the paving had been completed and assessment execution issued and the municipality undertook to enforce and collect it.

The decision of the Supreme Court of Georgia in said case is reported in *Georgia Power Co. v. City of Decatur*, 168 Ga. 705. We set out the following extracts (Pages 12, 13, and 15) from the brief of the City of Decatur filed in the Supreme Court of Georgia in said case:

"It (appellants) sets up the contentions that the paving is no benefit, and that, therefore, the defendants

ought not to pay it. The law which authorizes these paving charges provides, for such an issue as that, a defense by affidavit of illegality, and it is elementary law that in such cases the defense must be presented that way and no other.

"The law under which this assessment is made will be found in the Acts of 1919, page 934. It provides for defense by way of affidavit of illegality. Among the decisions applicable generally to such defenses may be mentioned:

Hart v. Lagaron, 46 Ga. 396;

Ansley v. Glendenning, 56 Ga. 286;

Russell v. O'Dowd, 48 Ga. 475 (3);

Hitchcock v. Culver, 107 Ga. 184 (2);

Park v. Callaway, 128 Ga. 119 (4);

Rooney v. McCall, 128 Ga. 249 (2);

Matthews v. Gelders, 129 Ga. 103 (2);

Williams v. Kennedy, 134 Ga. 339 (1);

Smith v. Murphy, 140 Ga. 80;

Daniel v. Rosenheim, 152 Ga. 278 (2).

"Cases in which the principle has been applied especially where street improvements were involved will be found as follows:

Regenstein v. Atlanta, 98 Ga. 170;

Gainesville v. Dean, 124 Ga. 750;

Rice v. Macon, 117 Ga. 401.

"Other like instances are:

Lanham v. Rome, 136 Ga. 398;

Waycross v. Cowart, 164 Ga. 721;

Cotton Mill v. Social Circle, 163 Ga. 465.

"* * It can be and should be made the subject of separate litigation, and the only way to do this is by affidavit of illegality.* * * *

> "But if defendants desire to set up its illegality and escape paying it (the special assessment) they must do that in a separate case and by affidavit of illegality and not otherwise."

In appellants' second ground of their statement of the jurisdiction of the Supreme Court of the United States, the provisions of the Acts in question are set out and discussed and what is there said need not be repeated here.

The right of a property owner to challenge his liability for the assessment either in whole or in part, given the property owner by affidavit of illegality or issues joined as provided in the special assessment acts after the improvement has been completed and execution issued for the collection of the assessment against the property owner, has been repeatedly held as affording due process of law.

In the instant case the special assessment act so provided. It was the only course of procedure open to appellants. In the case at bar appellants adopted this course of procedure. They set up their defense in an action brought by the municipality to recover upon a special municipal paving execution. This was the sole and only opportunity given to appellants to be heard.

There can be and is no estoppel when appellants follow the only procedure which is open or permitted them under the statute in question. The Supreme Court of Georgia in holding that appellants were estopped from introducing evidence in the only proceeding open to them upon the question of their liability for the amount of the assessment made against them was and is a violation of the due process of law provision of the constitution of the United States.

The Georgia cases of estoppel cited by the Supreme Court of the State of Georgia in its decision place the estoppel not upon the reliance by the property owner upon the sole remedy afforded by the special assessment acts, but are

based upon the fact that in such a hearing it was established that the property owner had accepted benefits and failed to follow the procedure as provided in the act. In the instant case appellants were denied the right to show that they had received no benefits. Evidence of estoppel by the acceptance of benefits would be in rebuttal or in the nature of a replication to appellants' defense. The Supreme Court of Georgia rules out all evidence of defense and decides a case upon the basis of an estoppel. This is clearly a denial of due process of law.

Saunders v. Shaw, 244 U. S. 317.

(d). Estoppel may arise where a property owner accepts benefits and then undertakes to avoid payment therefor. In the case at bar appellants are denied the right to establish that they received no benefit whatever from the paving assessment in question.

No estoppel arises where the property or property owner is not benefited by the improvement.

O'Brien v. Wheelock, 184 U. S. 430.

Third: That the Georgia statutes in question, as construed and enforced against appellants in the decision rendered by the Supreme Court of Georgia on the 30th of September, 1935, were repugnant to the Fourteenth Amendment to the Constitution of the United States.

In its said decision the Supreme Court of the State of Georgia held that the special paving assessment statutes in question were local acts—amendments to the municipal charter of the City of Decatur. They were not general statutes; they were not amendments to the charters of private corporation, nor amendments to appellants' corpor-

ate charter. Cases dealing with general laws which are amendments to private charters or utility companies' charters are not in point.

The Supreme Court of Georgia in its decision rendered on September 30th, 1935, held that under the municipal charter amendments the City of Decatur "had legislative authority to pave its streets and to assess a portion of the cost of such improvement against the street railway company occupying and using, with the consent of the city, the street paved, irrespective of benefit to the company. This authority comes both within the taxing and police power reserved in the State."

The Supreme Court of the State of Georgia does not say whether the special paving assessment in question comes under the taxing power or under the police power.

In *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; 343,344 this Court held:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or *other property specially benefited.*" (Italics ours.)

The construction placed upon said local assessment acts by the Supreme Court of the State of Georgia is that in order to sustain special assessments against certain property owners benefits must result from the improvement, whereas, as to other property owners, an assessment can be made "irrespective of benefits."

Such construction of said Acts renders them unconstitutional and violative of the equal protection of law provision of the Federal Constitution.

Street railway companies are entitled to the same constitutional protection and guarantee accorded to others.

44 Corpus Juris, "Municipal Corporations," page 534, Section 2896.

Road Imp. Dist. No. 1 of Ark. v. Missouri-Pac. R. Co., 274 U. S. 188.

City of Commerce v. Southern Ry. Co., 35 Fed. (2d) 331.

Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340, 341.

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427.

United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660.

The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably.

N. C. & St. L. Rwy. Co. v. Walters, 294 U. S. 405; 79 Law Ed. 458.

Under the due process of law clause of the Federal Constitution, property owners are entitled to a hearing as to whether a police regulation or requirement is legal. In the case at bar appellants were denied any hearing.

The construction put upon the special local assessment statutes in question by the Supreme Court of the State of Georgia, in its decision rendered on the 30th of September, 1935, renders the said statutes unconstitutional, for, as thus construed, appellants are denied the equal pro-

tection of the law and the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY & ELECTRIC COMPANY,
GEORGIA RAILWAY & POWER COMPANY AND
GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

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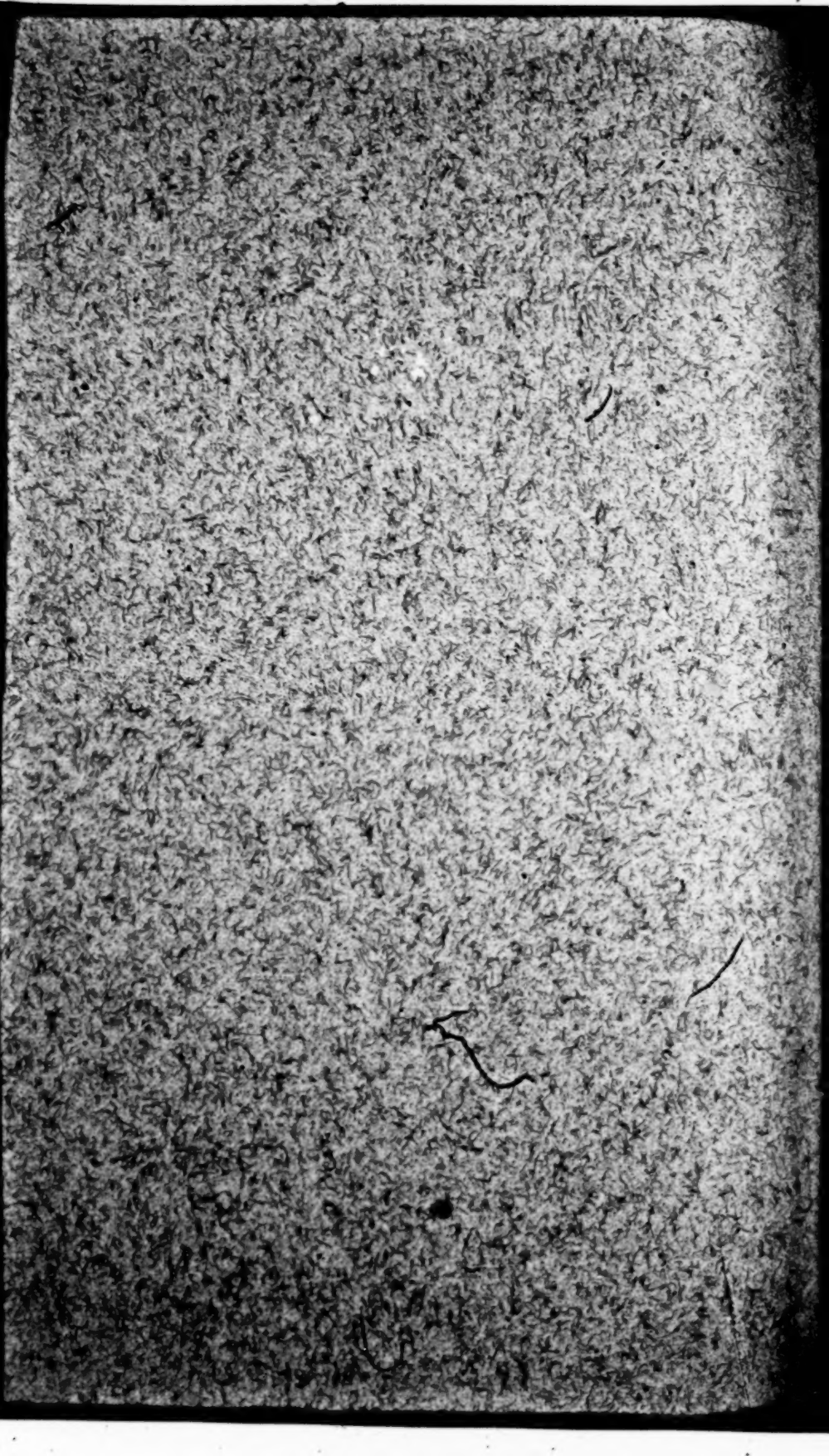

SUBJECT INDEX

Pages

List of cases, text books and statutes cited in brief:

Reference to opinion delivered by the Supreme Court of the State of Georgia set out in the record..... 1

Reference to statement of grounds on which the jurisdiction of this Court is invoked..... 2

Statement of case..... 3

Specification of Assigned Errors..... 3

Argument and Citation of Authorities..... 13

First, Second and Third Assignments of Error..... 13

Fourth Assignment of Error..... 18

Fifth and Seventh Assignments of Error..... 20

Sixth and Eighth Assignments of Error..... 22

Appendix "A"..... 29

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

Pages

Bostwick v. Brinkerhoff, 106 U. S. 3, 4 13

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427 .. 20

City of Commerce v. Southern Ry. Co., 35 Fed. (2d) 331 .. 20

Durant v. Essex Company, 101 U. S. 555 ..... 14, 15, 16

Ex Parte Dubuque & Pacific Rd. Co., 1 Wallace 69, 73 .. 14

Ex Parte Seabold v. United States, 12 Peters 489, 492 ... 14, 16

Ex Parte Union Steamboat Co., 178 U. S. 317 14

Gaines v. Rugg, 148 U. S. 228 ..... 14, 16

Georgia Rwy. & Power Co. v. Decatur, 262 U. S. 432, 437 13

Georgia Rwy. & Elec. Co. v. Decatur, 295 U. S. 165 .. 21, 26, 27

Georgia Power Co. v. City of Decatur, 168 Ga. 705 24

Georgia Power Co. v. City of Decatur, 170 Ga. 699 23

Georgia Power Co. v. City of Decatur, 173 Ga. 219 23

Georgia Power Co. v. City of Decatur, 179 Ga. 471 23

Gulf Refining Co. v. United States, 269 U. S. 125, 135, 136 ..... 13, 15

Haseltine v. Central Bank, 183 U. S. 130 13

Hickman v. Fort Scott, 141 U. S. 415 16

Horkan v. City of Moultrie, 154 Ga. 444; 449; 450 26

In Re Potts, 166 U. S. 263 ..... 14, 16

In Re Sanford Fork & Tool Co., 160 U. S. 247, 259 14

In Re Washington & Georgetown R. R. Co., 140 U. S. 91 .. 14

In Re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, 64 Fed. (2d) 915 (5) 19

Kansas City Southern R. R. Co. v. Guardian Trust Co., 281 U. S. 1, 2, (6), 11 14

	Pages
Mayor & Council of Gainesville v. Dean, 124 Ga. 750	26
Mayor, etc., of Washington v. Moseley, 41 Ga. App. 439; 442	26
McKnight v. Craig's Administrator, 6 Cranch 183	16
Mackall v. Richards, 116 U. S. 45	14
Metropolitan Co. v. Kaw Valley Drainage Dist., 223 U. S. 519, 523	15
Nashville, C. & St. L. Rwy. Co. v. Walters, 294 U. S. 405	21
Norfolk Turnpike Co. v. Oyster Comm'n., 226 U. S. 99, 101	13
O'Brien v. Wheelock, 184 U. S. 430	27
Rice v. Mayor & Council of Macon, 117 Ga. 401	25
Road Imp. Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188	20
Road Imp. Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340	20
Schell v. Dodge, 107 U. S. 629	16
Saunders v. Shaw, 244 U. S. 317, 319	21, 26
Schlosser v. Hemphill, 198 U. S. 173, 175	13
Thompson v. Maxwell Land Grant Co., 168 U. S. 451, 456	
United Railway & Electric Co. v. Mayor of Baltimore, 127 Md. 660	20
Washington Bridge Co. v. Stewart, 3 Howard 413, 425	14, 15
Wright v. Mayor & Council of Macon, 117 Ga. 504	25

STATUTES AND TEXT BOOKS CITED

Georgia Laws 1919, Pages 934 et seq	6, 7, 9, 10, 12, 25
Georgia Laws 1924, Pages 534 et seq	6, 7, 9, 10, 12, 25
44 Corpus Juris, "Municipal Corporations," Page 534, Sec. 2896	20

ALPHABETICAL LIST OF CASES CITED IN APPENDIX "A"

	Pages
Ansley v. Glendenning, 56 Ga. 286	29
Cotton Mill v. Social Circle, 163 Ga. 465	30
Daniel v. Rosenheim, 152 Ga. 278 (2)	29
Gainesville v. Dean, 124 Ga. 750	30
Georgia Power Co. v. City of Decatur, 168, 705	29
Hart v. Lagaron, 46 Ga. 396	29
Hitchcock v. Culver, 107 Ga. 184 (2)	29
Lanham v. Rome, 136 Ga. 398	30
Mathews v. Gelders, 129 Ga. 103 (2)	29
Park v. Callaway, 128 Ga. 119 (4)	29
Regenstein v. Atlanta, 98 Ga. 170	30
Rice v. Macon, 117 Ga. 401	30
Roney v. McCall, 128 Ga. 249 (2)	29
Russell v. O'Dowd, 48 Ga. 475 (3)	29
Smith v. Murphy, 140 Ga. 80	29
Waycross v. Cowart, 164 Ga. 721	30
Williams v. Kennedy, 134 Ga. 339 (1)	29

IN THE

Supreme Court of the United States

GEORGIA RAILWAY & ELECTRIC CO., GEORGIA RAILWAY & POWER CO., and GEORGIA POWER COMPANY,

Appellants,

v.

CITY OF DECATUR,

Appellee.

No. 625
October Term,
1935.

BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY

I.

OPINION AS DELIVERED IN THE COURT BELOW

As yet the opinion delivered in the case at bar by the Supreme Court of the State of Georgia has not been reported in the official Georgia Reports.

The opinion brought to this Court for review is found in the printed transcript of the record, pages 129–146.

II.

FEDERAL QUESTIONS INVOLVED SHOWING THE JURISDICTION OF THIS COURT

In accordance with Paragraph 1 of Rule 12 there has heretofore been compiled and filed with this Court a concise statement of the grounds on which the jurisdiction of this Court is invoked. Also in accordance with Rule Seven, (3), of the Supreme Court of the United States, appellants have filed a brief in opposition to appellee's motion to dismiss the appeal or affirm the decision of the Supreme Court of Georgia. In said brief the Federal questions involved showing the jurisdiction of this Court are discussed.

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

First: That the decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, (record pages 129-146) was not in conformity with the opinion and mandate rendered by the Supreme Court of the United States in this case on April 29th, 1935 (295 U. S. 165).

Second: The said decision of the Supreme Court of the State of Georgia denied appellants the right to introduce evidence on material issues in the cause and denied them the right to be heard to challenge the fact of appellants' liability or the amount of their liability for the paving assessment in question, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Third: The Georgia statutes in question, as construed and enforced against appellants in said decision of the Supreme Court of the State of Georgia, are repugnant to the Fourteenth Amendment to the Con-

stitution of the United States in that they deny appellants the equal protection of the law and the due process of law as therein guaranteed.

III.

STATEMENT OF CASE

The case has heretofore been before this Court and on April 29, 1935, this court rendered an opinion (*Georgia Rwy. & Elec. Co. v. City of Decatur*, 295 U. S. 165), and issued its praecipe in which it ordered, adjudged and decreed that the decree of the Supreme Court of the State of Georgia (*Georgia Power Co. v. City of Decatur*, 179 Ga. 471, 490), be, and the same is hereby reversed and "that this cause be and the same is hereby remanded to the said Supreme Court (of Georgia) for further proceedings not inconsistent with the opinion of this Court."

On the 30th of September, 1935, the Supreme Court of the State of Georgia rendered a judgment of affirmance in said case upon the same record that was before the Supreme Court of the United States when this Court entered its judgment and decree of reversal. (Record Pages 129–146).

IV.

SPECIFICATION OF THE ASSIGNED ERRORS UPON WHICH A DECISION OF THIS COURT IS INVOKED

Appellants respectfully request a consideration and determination of each and all of the assignments of error made in the case at bar.

These assignments of error are set out on pages 151–158 of the printed transcript of the record and are as follows:

1. The opinion, judgment and decree of the Supreme Court of the State of Georgia (the highest Court of said State), rendered on the 30th of September, 1935, was erroneous in that it was inconsistent with the opinion, judgment, mandate and praecipe issued upon the same record and in the same case by the Supreme Court of the United States on the 29th of April, 1935.

2. The opinion, judgment and decree of the Supreme Court of the State of Georgia rendered on September 30, 1935, was erroneous in that it failed to give binding effect to the decision, opinion, judgment and praecipe rendered and issued upon the same record and in the same case by the Supreme Court of the United States on April 29, 1935, and in that it did not give effect to the said opinion of the Supreme Court of the United States as the law of the case according to the mandate issued by said Court to the Supreme Court of the State of Georgia.

3. The opinion, judgment and decree of the Supreme Court of the State of Georgia, rendered on the 30th of September, 1935, was erroneous in that the further proceedings had in the said Supreme Court of the State of Georgia were inconsistent with the opinion, judgment, mandate and praecipe rendered and issued upon the same record in the same case by the Supreme Court of the United States, as follows:

(a) The mandate of the Supreme Court of the United States ordered a reversal.

The judgment and decree of the Supreme Court of the State of Georgia was an affirmance.

(b) The opinion of the Supreme Court of the United States was that the Georgia assessment statutes in question contemplate "the existence of benefits to the railway company as the basis for the assessment."

The Supreme Court of the State of Georgia failed and refused to follow said opinion and decision as the law of the case.

(c) The opinion and decision of the Supreme Court of the United States held that the existence of benefits resulting from the paving improvement in question was a material and relevant issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States the Georgia Railway & Electric Company, Georgia Railway and Power Company and Georgia Power Company had ~~the~~ constitutional right to introduce pertinent evidence and proof to overcome a rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question and the improvement assessment ordinances made thereunder, and that the failure and refusal of the lower Court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived the said Companies of the due process of law as guaranteed to them by the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Georgia denied the said Companies the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question.

(d) The opinion and decision of the Supreme Court of the United States held that under the Georgia statutes and ordinances, authorizing and making assessment for the paving improvement in question against the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, without any compensating advantage was and is an arbitrary abuse of power amounting to the confiscation of the property of said companies in contravention of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Georgia failed and refused to give force and effect to said opinion and decision and did not accept and follow it as the law of the case.

(e) The mandate of the Supreme Court of the United States was that "the decree of the Court below must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion."

The Supreme Court of the State of Georgia without remanding said case to the trial Court for a hearing; without any order purporting to grant a re-hearing of said case in the Supreme Court of the State of Georgia; without change of the record in the case carried to said Court, and without notice to the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, entered a judgment of affirmance in said case.

4. The decision and judgment of the Supreme Court of the State of Georgia rendered on September 30, 1935, holding that under the charter amendments of the City of Decatur (Ga. Laws 1919, p. 934 et seq. and Ga. Laws 1924, p. 534, et seq.) legislative authority had been conferred upon said municipality to pave its streets and to assess a portion of the cost of such improvement against street railway companies occupying the street improved irrespective of benefits to the street railway company and that this authority comes both within the taxing and police power reserved in the State, was erroneous:

(a) In failing to accept and follow, as the law of the case, the construction of said statutes as set out in the opinion of the Supreme Court of the United States, rendered in said case.

(b) The said construction sought to be placed on said legislative acts (Ga. Laws 1919, p. 934 et seq. and Ga. Laws

1924, p. 534 et seq.) would render said statutes unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that said statutes, as thus construed, would deny to appellants, and each of them, the equal protection of the law and the due process of law as therein guaranteed, and confiscate the property of appellants in contravention of said Constitutional amendment, upon each of the following grounds:

(1) As against all other parties, the improvement assessments made under said legislative acts, must be based upon special benefits accruing to particular property affected thereby. As against street railway companies, and appellants in the instant suit, the paving assessment need not be based upon special benefits accruing to particular property affected thereby, nor upon benefits accruing to the owners of such property.

(2) As against all other parties, such improvement assessments cannot exceed the special benefits accruing to particular property specially benefited thereby, but as against street railway companies, and appellants, such assessment can exceed not only the special benefits resulting to the particular property affected thereby, but also all special benefits whatever resulting to the property owner.

In said suit there was drawn in question the validity and constitutionality of said statutes of the State of Georgia, and the decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes, as construed in said opinion of September 30, 1935, which decision is hereby assigned as error.

5. The decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, construed the Georgia Legislative amendments to the charter of the City of Decatur (Ga. Laws, 1919; p. 934 et seq. and Ga. Laws 1924, p.

534 et seq.) and municipal ordinances passed thereunder as not requiring any benefits to street railway companies or to any street railway company's property and as depriving street railway companies, and appellants, of any right to have the question of benefits, or the entire lack of benefits, presented, heard, passed upon or determined in any judicial hearing, and made the action of the municipality conclusive with reference to improvement assessments made against street railway companies. The said decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said Georgia Legislative Acts, as thus construed, and said decision is hereby assigned as error upon each of the following grounds:

(a) In failing to accept and follow, as the law of the case, the construction of said statutes as set out in the opinion of the Supreme Court of the United States, rendered in said case.

(b) Said construction of said Georgia Legislative Acts renders said Legislative Acts unconstitutional and repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to appellants, and each of them, the equal protection of the law and due process of law as there guaranteed. Such construction of the said Legislative Acts and municipal ordinances passed thereunder makes the action of the municipality conclusive upon street railway companies and appellants and deprives them of the right of a judicial hearing on the question of the confiscation of their property; the entire lack of benefits, and on the question of the excessive amount of improvement assessment made against Appellants.

The decision of the Supreme Court of the State of Georgia was in favor of the validity and constitutionality of said statutes and ordinances, as thus construed, and said decision is hereby assigned as error.

In said suit there was drawn in question the validity and constitutionality of said statutes of the State of Georgia (Ga. Laws 1919, p. 934 et seq. and Ga. Laws 1924, p. 534 et seq.) and ordinances passed thereunder, on the grounds that said statutes were repugnant to the Fourteenth Amendment of the Constitution of the United States, in that they deny to appellants, and each of them, the equal protection of the law and the due process of law as therein guaranteed.

6. The Supreme Court of the State of Georgia, in its opinion and decision rendered on the 30th of September, 1935, held that the failure of Appellants to take legal action to prevent or to enjoin the municipality from constructing the paving improvement in question, and its failure to enjoin the paving assessment made by the municipality, estops appellants from pleading the illegality and unconstitutionality of the assessment made against them in a suit at law brought for the collection of the amount of the assessment. The said decision was erroneous upon each of the following grounds:

(a) There was no pleading nor evidence in said case raising the question of estoppel.

(b) Appellants were given no hearing and no opportunity to be heard with reference to estoppel. All testimony and evidence tendered by appellants on the question of their liability was excluded, resulting in a denial of due process of law violative of the Fourteenth Amendment of the Constitution of the United States.

(c) The said decision was not in conformity with the decision of the Supreme Court of the United States rendered in said case on April 29, 1935, in which the Supreme Court (upon the same record as that before the Georgia Supreme Court) held that the refusal of the lower court to receive and consider proof and evidence offered by appellants

with reference to a lack of benefits, was in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

(d) The Georgia Legislative statutes (Ga. Laws 1919, p. 934, et seq. and Ga. Laws 1924, p. 534 et seq.), under which the paving improvements were constructed, and under which assessment therefor was sought to be made against appellants, as construed by the decision of the Supreme Court of the State of Georgia, prevented appellants from going into a Court of Equity to enjoin the improvements from being made by the municipality by giving the parties against whom an assessment was made the right, in a legal action, to set up the defense that the whole or any part of the amount of such assessment was not due. The Georgia Court therefore erred in holding that appellants were estopped from denying that they owed said municipality the whole or any part of the assessment sought to be enforced against them.

(e) Georgia Laws (Ga. Laws 1919, p. 934, et seq. and Ga. Laws 1924, p. 534, et seq.) provide that a party against whom an improvement assessment is made under said Acts may, in a legal proceeding brought to enforce said assessment, contest the whole or any part of the amount of the assessment.

Under the decision of the Supreme Court of the State of Georgia said provision of said statutes prevents a party against whom an assessment is made from having the right to enjoin the construction of the improvement and the issuance of an assessment execution therefor.

To the action brought against appellants by the municipality to collect the amount of the improvement assessment in question, appellants set up the defense that they did not owe the whole or any part of said assessment and that said

assessment would deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Georgia Supreme Court in denying the Companies the right to set up their defense to said suit construed the statutes in question so as to deprive appellants of the right to a judicial hearing as to whether they owe the whole or any part of the assessment. Said statutes, as thus construed, are unconstitutional in that appellants are deprived of the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that such construction of the statutes denies appellants the right to any judicial determination as to their liability for improvement assessments.

7. The opinion, judgment and decree of the Supreme Court of Georgia, rendered on September 30, 1935, was erroneous because said opinion, judgment and decree denied to petitioners the equal protection of the law and due process of law and is therefore violative of Section 1, Article 14 of the Constitution of the United States, in that said opinion, judgment and decree denied appellants the right to introduce evidence in said cause on the material issue in said cause or to challenge the fact of their liability or the amount of their liability for the assessment sought to be collected in said case.

8. The opinion, judgment and decree of the Supreme Court of Georgia, rendered on September 30, 1935, is erroneous because said Court held that appellants are estopped by laches from challenging their liability for the paving assessment sought to be enforced against them in said cause, either on the ground that the enforcement of the assessment will deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, or as to the fact or amount of liability, as appellants did not institute a

legal action to prevent the street improvement and the assessment against them or their property but waited until the paving was completed and the assessment made and execution issued therefor before calling into question appellants' liability. Said decision is erroneous:

(a) The Acts of the Legislature of Georgia under which the assessment in question was made provide for a hearing on the fact of the liability or the amount thereof after the paving is completed, the assessment made, and an execution issued to collect the assessment. (Georgia Laws 1919, pages 934, et seq. and Georgia Laws 1924, pages 534, et seq.).

(b) As a matter of law and under the said provisions of said Acts (as repeatedly construed by the decisions of the Supreme Court of Georgia), neither appellants nor any other single property owner can maintain an action to prevent the paving of the streets by a municipality upon the sole ground that such person or his property is not or would not be liable for an assessment therefor, nor could appellants or any other single property owner maintain such an action to determine in advance its liability or the amount for which it or its property will be liable for assessment.

(c) In the instant case appellants adopted the only course open to them to determine whether or not they were liable for said assessment, in whole or in part.

The said opinion, judgment and decree of the Supreme Court of the State of Georgia is so arbitrary, so unreasonable, and so without any support in law as to constitute a denial to appellants of the equal protection of the law and due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT AND CITATION OF AUTHORITIES RELIED UPON

(A.)

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

The first, second and third assignments of error will be considered together, as each of these assignments raise the question that the decision of the Supreme Court of the State of Georgia rendered on September 30, 1935, (record pages 129-146) was erroneous and inconsistent with the opinion, judgment, mandate and praecipe issued upon the same record and in the same case by the Supreme Court of the United States on the 29th of April, 1935, (reported in 295 U. S. 165) upon each of the grounds and specifications as set out in said assignments of error.

These assignments of error are set out on pages 4-6 of this Brief and on pages 151-153 of the printed record.

The Supreme Court of the United States has jurisdiction only over final decisions of the highest State court.

Bostwick v. Brinkerhoff, 106 U. S. 3, 4;

Haseltine v. Central Bank, 183 U. S. 130;

Schlosser v. Hemphill, 198 U. S. 173, 175;

Norfolk Turnpike Co. v. Oyster Comm'n, 226 U. S. 99, 101;

Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437;

Gulf Refining Co. v. United States, 269 U. S. 125, 135, 136.

Therefore, whatever was before this court for decision and was considered, passed upon and decided is final and conclusive, and becomes the law of the case.

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any 'other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded.' "

Ex Parte Seabold v. United States, 12 Peters 489, 492.

Washington Bridge Co. v. Stewart, 3 Howard 413, 425.

Ex Parte Dubuque & Pacific Rd., 1 Wallace 69, 73.

Durant v. Essex Company, 101 U. S. 555.

Mackall v. Richards, 116 U. S. 45.

In Re Washington & Georgetown R. R. Co., 140 U. S. 91.

Gaines v. Rugg, 148 U. S. 228.

In Re Potts, 166 U. S. 263.

Ex Parte Union Steamboat Co., 178 U. S. 317.

Kansas City Southern R.R. Co. v. Guardian Trust Co., 281 U. S. 1, 2, (6), 11 and see cases there cited.

No question, once considered and decided by this court, can be re-examined at any subsequent stage of the same case.

In Re Sanford Fork & Tool Co., 160 U. S. 247, 259. (See cases there cited.)

See also:

Washington Bridge Co. v. Stewart, 3 How. 413, 425.

Durant v. Essex Company, 101 U. S. 555, 556.

In *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451, 456, this Court held:

"It is the settled law of this Court, as of others, that whatever has been decided on one appeal or writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. Supervisors v. Kennicott, 94 U. S. 498, and cases cited in the opinion; *Clark v. Keith*, 106 U. S. 464; *Chaffin v. Taylor*, 116 U. S. 567; *Northern Pacific Railroad v. Ellis*, 144 U. S. 458; *Great Western Telegraph Company v. Burnham*, 162 U. S. 339, 343."

A praecipe which directs the State court to proceed consistently with the opinion of the Court has the affect of making the opinion a part of the mandate, as thought it had been therein set out at length.

Metropolitan Co. v. Kaw Valley Drainage Dist., 223 U. S. 519, 523.

Gulf Refining Co. v. United States, 269 U. S. 125, 135.

A decision rendered by a majority of this Court is as effective as if all the Judges had concurred therein.

Washington Bridge Co. v. Stewart, 3 Howard 413, 425.

Durant v. Essex Company, 101 U. S. 555, 556.

A dissenting opinion merely shows that the questions therein discussed were before the Court and were considered and determined by the Court in the decision rendered in the case.

The third assignment of error states the questions raised and decided by this Court in its opinion reported in *Georgia Rwy & Electric Co. v. City of Decatur*, 295 U. S. 165, and sets out and specifies the particulars in which the decision of the Supreme Court of Georgia, rendered on the 30th of September, 1935, were not in conformity or consistent with the opinion and mandate of this Court.

The mandate and praecipe of the United States Supreme Court directed "that the decree of the said Supreme Court (of Georgia) in this cause be, and the same is hereby reversed." When, on the same record, the Supreme Court of the State of Georgia rendered a judgment of affirmance, it did not comply with the mandate issued in said case by this Court.

Hickman v. Fort Scott, 141 U. S. 415;

Durant v. Essex Co., 101 U. S. 555;

McKnight v. Craig's Administrator, 6 Cranch, 183.

See also:

Gaines v. Rugg, 148 U. S. 228, 239, 240; 241-244.

The opinion of the Supreme Court of the United States was that the Georgia assessment statutes in question contemplate "the existence of benefits to the railway company as the basis for the assessment." This Court's construction of said statutes is final and will not be altered, changed or reversed, in the same case, by this Court after the term in which its decision has been rendered.

Seabold v. United States, 12 Peters, 488, 492;

Schell v. Dodge, 107 U. S. 629.

The Supreme Court of the State of Georgia failed and refused to follow said opinion and decision as the law of the case. To hold that the Supreme Court of Georgia has the power to review, change or alter said decision of the Supreme Court of the United States with reference to said construction of the statutes in question, would give the State Court greater power and jurisdiction over the Court's decision than this Court itself will exercise.

The opinion and decision of this Court held that the existence of benefits resulting from the paving improvement in question was a relevant and material issue and that under the equal protection clause and the due process of law provision of the Fourteenth Amendment to the Constitution of the United States appellants had the constitutional right to introduce pertinent evidence and proof to overcome the rebuttable presumption of benefits arising from the Georgia statutes and ordinances authorizing the paving improvement in question; and also held that the failure and refusal of the lower Court to admit, receive and consider evidence and proof to show and establish a lack of benefits deprived appellants of due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the State of Georgia, in its decision rendered on September 30, 1935, denied appellants the right to offer, tender or introduce evidence to show or establish a lack of benefits from the paving improvement in question. Such decision by the Georgia Supreme Court was not in conformity with the decision, opinion and mandate of this Court.

The said opinion and decision of the Supreme Court of the United States held that under the Georgia statutes and ordinances, authorizing and making assessments for the paving improvement against appellants, without any compensating advantage, was and is an arbitrary abuse of power amounting to the confiscation of the property of appellants in contravention of the Fourteenth Amendment to the Constitution of the United States. The said decision of the Supreme Court of Georgia failed and refused to give force and effect to the said opinion and decision of this Court and did not accept or follow it as the law of the case.

When the mandate issued by this Court directed the State Supreme Court to enter a decree of reversal and "remanded

(the case) for further proceedings not inconsistent with the foregoing opinion," the Supreme Court of the State of Georgia did not comply with said mandate, when without any change of the record, without allowing appellants to introduce any evidence, and without remanding the case to the trial Court for a hearing, it entered a judgment of affirmance.

The decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, not only did not accept the opinion of this Court as the law of the case but, in effect, reversed the judgment, opinion and decree of this Court.

(B.)

FOURTH ASSIGNMENT OF ERROR

This assignment of error is set out on page 6 of this Brief and also on pages 153, 154 of the printed record.

This Court in its decision (*Georgia Rwy. & Elec. Co. v. Decatur*, 295 U. S. 165) considered and determined the construction of the Georgia statutes in question, amending the charter of the City of Decatur. The construction placed upon a State statute by the highest Court of a State "becomes part of the statute as much as though it were found in appropriate words in its text."

When such question arises in this Court it has the same authority and duty to decide it as it has to decide any other questions which arise in a cause.

When this Court adjudicates that a State statute has been construed by the highest Court of the State in a certain way, the determination of such question is final and conclusive and the law of the case. In the same case the State Court has no power or authority to reverse the adjudication of this

Court with reference to such question or decision any more than it has to reverse it on other questions which have been raised, considered and decided. (See cases cited under subdivision "A" supra).

In Re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, 64 F. (2d) 915, (5).

The decision of this Court in this case specifically and definitely held that the State statutes in question contemplate "the existence of benefits to the railway as a basis for the assessment." This question was raised, considered and adjudicated. The opinion discusses the contention of the City that the necessity of benefits "is not applicable to street railway companies having tracks in the street improved;" and that the City "seeks to sustain the assessment as an exercise of the police power and the alleged power of the State to alter and amend corporate charters." The dissenting opinion showed that this question was before this Court for its consideration and adjudication. This Court decided adversely to the City's contention and held that the statutes contemplate "the existence of benefits to the railway as a basis for the assessment;" and that "if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain * * * * the assessment amounts to confiscation."

Said decision on this question became the law of the case and fixed the rights of the respective parties in this litigation.

If it can be conceived that the State Court has the power and authority to refuse to follow the decision of this Court as the law of this case, then the assessment statutes in question, as construed by the Supreme Court of Georgia in its opinion rendered on the 30th day of September, 1935, are unconstitutional and repugnant to the Fourteenth Amendment to the Constitution of the United States. The con-

struction placed upon the assessment statutes in said opinion deny to appellants equal protection of the law and due process of law, resulting in the confiscation of appellants' property.

Under such construction all other parties than appellants are only liable for a paving improvement assessment based upon special benefits accruing from the improvement, while as against appellants, an assessment can be made without the necessity of any benefits to appellants or appellants' property.

Street railway companies are entitled to the same and equal constitutional protection accorded others.

44 Corpus Juris, "Municipal Corporations," page 534, Section 2896.

Road Imp. Dist. No. 1 of Ark. v. Missouri Pac. R. Co., 274 U. S. 188.

City of Commerce v. Southern Ry Co., 35 Fed. (2d) 331.

Road Improvement Dist. No. 1 of Franklin Co. Ark. v. Missouri Pac. R. Co., 2 Fed. (2d) 340, 341.

City of Barree v. Barree Chelsa R. R. Co., 123 Atl. 427.

United Railway & Elec. Co. v. Mayor of Baltimore, 127 Md. 660.

(C.)

FIFTH AND SEVENTH ASSIGNMENTS OF ERROR

These assignments of error are set out on pages 7 and 11 of this brief and also on pages 154, 155, 157 of the printed record.

What has heretofore been said with reference to the adjudication of this Court in the case at bar as being the law of the case, is applicable to these assignments of error.

When this same case was before this Court (295 U. S. 165), this Court held:

(a) That the evidence offered by appellants was material and competent.

(b) That the refusal of the Court to admit said testimony "amounts to a denial of a hearing on that issue in contravention of the due process of law of the Constitution."

(c) "If the burden imposed is without any compensating advantage (as appellants offered to show) the arbitrary abuse of the power exercised is plain * * * * the assessment amounts to confiscation."

(d) "The offer of appellants to surrender all their railway property within the city, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected."

(e) "The existence of benefits resulting from the improvement was material."

(f) "The refusal of a Court to receive and consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

(g) "The decree of the Court below must be reversed."

As set out in these assignments of error, the decision of the Supreme Court of the State of Georgia, rendered on September 30, 1935, denied appellants the reversal which the mandate of the Court directed and on the same record, the State Court entered a decree of affirmance. The State Supreme Court failed or refused to follow any of the foregoing rulings and holdings of this Court.

Aside from the law of the case, the decision of the Supreme Court of Georgia of September 30, 1935, denied appellants the right to introduce evidence and to have a judicial hearing on material issues.

Such denial is in contravention of the due process of law provision of the Federal Constitution.

Saunders v. Shaw, 244 U. S. 317, 319:

Georgia Rwy. & Elec. Co. v. City of Decatur, 295 U. S. 165, and see cases there cited and collected.

This is true whether the special assessment in question is based upon benefits or upon a claimed exercise of police power and authority. Police power is subject to constitutional limitations and a party is entitled to a judicial hearing to determine whether or not it has been arbitrarily or unreasonably exercised.

N. C. & St. L. R. R. Co. v. Walters, 294 U. S. 405.

(D.)

SIXTH AND EIGHTH ASSIGNMENTS OF ERROR

These assignments of error are set out on pages 9 and 11 of this Brief and also on pages 155-158 of the printed record.

The mandate issued by this Court in this case on April 29, 1935, ordered a reversal by the Supreme Court of Georgia. Upon receipt of said mandate and on the same record, the Supreme Court of Georgia entered a judgment of affirmance without remanding the case to the trial Court for a hearing and without giving appellants any opportunity to introduc evidence on material issues. This was not in accordance with the mandate of this Court.

In the opinion rendered by the State Supreme Court on September 30, 1935, the Court said:

> Appellants "stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same. It is therefore too late for such company to avoid payment on the ground that enforcement of the assessment therefor will deprive the company of its property, in violation of the due process clauses of the State and Federal Constitutions."

Such holding was without foundation:

(a) It was not in conformity with the mandate of this Court.

(b) No issue of estoppel was raised by the pleadings and there was no evidence in said case establishing an estoppel.

In the previous litigation brought by the municipality against appellants to collect the paving assessment in question no claim was made by the municipality that appellants were estopped from contesting their liability therefor.

Georgia Power Co. v. City of Decatur, 170 Ga. 699;

Georgia Power Co. v. City of Decatur, 173 Ga. 219.

No issue or claim of estoppel was raised or made by the municipality in the present litigation.

Georgia Power Co. v. City of Decatur, 179 Ga. 471.

(c) The municipality is judicially estopped from claiming an estoppel. In previous litigation the municipality successfully contended that appellants could not contest the legality or constitutionality of the assessment, nor appel-

lants' liability for the assessment until the improvement had been completed and the municipality was undertaking to enforce an assessment therefor against appellants.

Before the municipality made the improvement, appellants notified the City of Decatur that neither they nor their property could receive any benefits from the paving and that no legal or valid assessment could be made against appellants or appellants' property therefor; and offered and tendered to the municipality its street railway property and franchise located within the municipality. The City of Decatur refused such tender and immediately brought suit in the Superior Court of DeKalb County compelling appellants to operate its street railway lines within the municipality. In answer to said suit defendants sought to plead that neither they nor their property would receive any benefits from the paving improvement; that the assessment against them would be unconstitutional and that no legal or valid assessment could be made against appellants.

In said litigation the municipality successfully contended that these questions could not be pleaded, raised nor adjudicated until the municipality had constructed and completed the improvement and was undertaking to collect the assessment against appellants.

In "Appendix A" to this Brief there are set out extracts from the Brief of the municipality, filed in the Supreme Court of Georgia, in said litigation.

The decision of the Supreme Court of Georgia in said case is reported in *Georgia Power Co. v. City of Decatur*, 168 Ga. 705.

(d) Appellants adopted the procedure and the only procedure permitted and prescribed under the assessment statutes in question.

The municipality's suit against appellants was predicated and based upon a paving assessment execution. The execution was issued under and by virtue of Georgia Laws 1919, pages 934 et seq. and Georgia Laws 1924, pages 534 et seq. Under said statutes appellants are given no right to prevent the paving and have no right to a hearing with reference to their liability for the assessment until after an assessment execution has been issued and the municipality is undertaking to collect therefor. Said statutes provide the only remedy or procedure open to appellants to determine whether or not they are liable for the improvement assessment in whole or in part.

Said Acts provide:

"Provided that the defendant in such execution shall have the right to file an affidavit denying that the whole or any part of the amount of such execution is due, and stating what he admits to be due, if any, which amount so admitted to be due shall be paid before the affidavit shall be received, the said affidavit to be filed with the marshal of said city and when received shall be returned by him to the Superior Court of DeKalb County and there tried and the issue determined as in cases of illegality, subject to all the penalties provided by law in cases of illegality for delay."

Under reported decisions of the Supreme Court of Georgia, such provision in a statute prohibits a property owner from going into Court to prevent the municipality from constructing the paving improvement and from raising or contesting the fact or amount of liability until the assessment execution is sought to be enforced against the property owner by the municipality.

Rice v. Mayor and Council of Macon, 117 Ga. 401;

Wright v. Mayor and Council of Macon, 117 Ga. 504;

Mayor and Council of Gainesville v. Dean, 124 Ga. 750;

Mayor, etc., of Washington v. Moseley, 41 Ga. App. 439; 442.

A property owner is not entitled to be heard in advance upon the fact or the amount of his liability, or the question of benefits or confiscation resulting from the assessment.

Horkan v. City of Moultrie, 154 Ga. 444; 449; 450.

When the municipality instituted the present action at law, seeking to recover a general judgment against appellants for the amount of the assessment execution, appellants adopted the only procedure open to them to determine whether or not they were liable for the paving assessment in question in whole or in part.

(e) When appellants adopt the only procedure allowed to them under the assessment statutes in question, there can be no estoppel. A denial of their right to set up this defense in the present action is a denial to them of any judicial hearing whatever. Such denial in and of itself contravenes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

Saunders v. Shaw, 244 U. S. 317;

Georgia Rwy. & Power Co. v. Decatur, 295 U. S. 165.

If the statutes be construed as denying appellants the right to any hearing, then the statutes as thus construed, are likewise unconstitutional.

(f) Appellants were given no hearing and no opportunity to be heard on the question of estoppel. The issue of estoppel was not raised by the pleadings. Under the due process of

law provision of the Federal Constitution appellants are entitled to a notice and a hearing on material issues.

All the testimony and evidence offered and tendered by appellants was excluded. This excluded evidence would have affirmatively established that appellants did not stand by and see the paving done and the expense incurred. In its opinion (*Georgia Rwy & Elec. Co. v. Decatur*, 295 U. S. 165) this Court held that "the offer of appellants to surrender all their railway property within the City, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected." Such tender was made prior to the construction of the paving and prior to the municipality's incurring any expense therefor. This, and the other excluded testimony, (record pages 87-109) would have affirmatively established that there was no basis for an estoppel against appellants.

(g) Estoppel may arise where a property owner accepts benefits and then undertakes to avoid payment therefor. In the case at bar appellants were denied the right to establish that they received no benefit whatever from the paving assessment in question.

No estoppel arises where the property or property owner is not benefited by the improvement.

O'Brien v. Wheelock, 184 U. S. 430.

Evidence of estoppel by the acceptance of benefits would be rebuttal or in the nature of a replication to appellants' defense. In the instant case appellants were denied the right to show that they had received no benefits.

There is no evidence in the record to show estoppel by conduct. Any such theory is refuted by the evidence. It

is undisputed that appellants offered to surrender all their railway property within the city, including the franchise. Such evidence refutes any possibility that the City of Decatur was induced by appellants' conduct to embark upon the improvement in question, under an assumption that appellants would be benefited to such an extent by the improvement that appellants would never call in question the amount of the assessment or the question of benefits. The decision of the Supreme Court of Georgia in holding that appellants were estopped, denied appellants due process of law as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

(h)The Georgia cases of estoppel cited by the Supreme Court of Georgia in its decision of September 30, 1935, are not applicable to the assessment statutes in question. Those cases are based upon the fact that in a judicial hearing it was established that the property owner had accepted benefits, and had failed to follow the procedure provided by the special assessment acts under which the assessment was made. The acts in said cases contain provisions essentially different from those under which the improvement in question was made.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX "A"

Extracts from the Brief of the City of Decatur, as filed in the Supreme Court of the State of Georgia in the case of *Georgia Power Co. v. City of Decatur*, 168 Ga. 705:

"There is another reason why this particular complaint about the paving ought not to be considered. It sets up the contentions that the paving is no benefit, and that, therefore, the defendants ought not to pay it. The law which authorizes these paving charges provides, for such an issue as that, a defense by affidavit of illegality, and it is elementary law that in such cases the defense *must be presented that way and no other.*

"The law under which this assessment is made will be found in the Acts of 1919, page 934.

"It provides for defense by way of affidavit of illegality. Among the decisions applicable generally to such defenses may be mentioned

Hart v. Lagaron, 46 Ga. 396
Ansley v. Glendenning, 56 Ga. 286
Russell v. O' Dowd, 48 Ga. 475, (3)
Hitchcock v. Culver, 107 Ga. 184, (2)
Park v. Callaway, 128 Ga. 119 (4)
Roney v. McCall, 128 Ga. 249 (2)
Mathews v. Gelders, 129 Ga. 103 (2)
Williams v. Kennedy, 134 Ga. 339 (1)
Smith v. Murphy, 140 Ga. 80
Daniel v. Rosenheim, 152 Ga. 278 (2)

"Cases in which the principle has been applied spec-

ially where street improvements were involved will be found as follows:

Regenstein v. Atlanta, 98 Ga. 170

Gainesville, v. Dean, 124 Ga. 750

Rice v. Macon, 117 Ga. 401

"Other like instances are:

Lanham v. Rome, 136 Ga. 398

Waycross v. Cowart, 164 Ga. 721

Cotton Mill v. Social Circle, 163 Ga. 465."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 625

THE GEORGIA RAILWAY & ELECTRIC COMPANY,
GEORGIA RAILWAY & POWER COMPANY AND
GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

REPLY BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

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Curtiss Printing Company, Inc., Atlanta, Ga.

SUBJECT INDEX

Pages

List of cases and authorities cited in brief ..... II, III

Appellee's Brief, Pages 2–6, Incorrectly Asserts that "The Mandate (of this Court) While Reversing the Judgment of the Supreme Court of Georgia, Left The Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties." 1

Sections III and IV (Pages 6–12), of Appellee's Brief, Erroneously Contends that "The Supreme Court of Georgia Was Not Precluded Either by the Decision of This Court Or by the Rule of 'The Law of the Case' from Construing the Statutes and Ordinances as It Did in Its Last Decision 2

Reserved Power of State to Amend or Appeal Appellants' Charters and of the Police Power of the State, Are Not Involved 7

Contention of Appellee That the Decision of the Supreme Court of Georgia Rests Upon an Independent, Non-Federal Ground of Estoppel (Section IX, Pages 18–23 of Appellee's Brief) is Not Well Founded 8

Appendix "A" 12–18

The State's Reserved Power to Alter or Amend Private Charters and the Question of Police Power of the State, Is not Involved in the Case at Bar 12

Cases Dealing with Police Power and Regulation Are Not Applicable 15

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

	Pages
Brooks v. Railroad Co., 102 U. S. 107	11
Durant v. Essex Co., 101 U. S. 555, 566	4
Ex Parte Sibbald, 12 Peters 488, 492	3
Ex Parte Union Steamship Co., 178 U. S. 317	2
Gaines v. Rugg, 148 U. S. 228, 239	5
Gila Reservoir Co. v. Gila Water Co., 205 U. S. 279	9
Hartford Life Insurance Co. v. Blincoe, 255 U. S. 129	2
Hickman v. Ft. Scott, 141 U. S. 415	4
Home Street Railway Co. v. City of Lincoln, 162 Fed. 133	5–11
In Re Potts, 166 U. S. 263, 265	6
Illinois v. Illinois Central Rd. Co., 184 U. S. 77; 92	11
Keystone Pecan Co. v. Clark, 149 Ga. 836	8
Mackall v. Richards, 116 U. S. 45, 47	5
Messinger v. Anderson, 225 U. S. 436	7
Sanders v. Mayor, etc., of Gainesville, 141 Ga. 441	9
Sneider Granite Co. v. Gast Realty Co., 245 U. S. 288, 290	2
United States v. Mayer, 235 U. S. 55, 67	5
United States v. New York Indians, 173 U. S. 464, 471	10
Ward v. Board of Comm. of Love County, 253 U. S. 17	8
Washington Bridge Co. v. Stewart, 3 How. 413, 425	3
Wetmore v. Karrick, 205 U. S. 141, 157	4–10

CONSTITUTION OF THE STATE OF GEORGIA, TEXT BOOKS, STATUTES, AND CASES CITED IN APPENDIX "A"

Pages

Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 18 (Code Section 6446 [1910]; Section 22-201 [1933]) 12

Constitution of the State of Georgia, Art. 1, Sec. 4, Par. 18 (Code Section 6391 [1910]; Section 2-401 [1933]) 13

Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 8 (Code Section 6437 [1910]; Section 2-1808 [1933]) 13

Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 17 (Code Section 6445 [1910]; Section 2-2503 [1933]) 14

14 Corpus Juris, "Corporations," P. 95, Sec. 58; P. 117, Sec. 106; P. 182, Sec. 184 12-13

Chicago, etc., Rwy. Co. v. Wisconsin Rd. Comm., 237 U. S. 220, 234 14

City of Augusta v. Augusta-Aiken Rwy Corp., 150 Ga. 529 15

City of Brunswick v. Gordon Realty Co., 163 Ga. 636, 641 16

City of Knoxville v. Knoxville Power & Lt. Co., 68 S. W. (2d) 936 17

Fielders v. New Jersey St. Railway Co., 53 Atl. 405; 54 Atl. 822 17

Pages

French v. Barber Asphalt Paving Co., 181 U. S. 324, 343 15

Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683, 697, 698 13

Piedmont Cotton Mills v. Georgia Rwy. & Elec. Co., 131 Ga. 129, 152 17

Southern Rwy. Co. v. Atlanta Railway & Power Co., 111 Ga. 679 17

Southern Rwy. Co. v. Rome Railway & Lt. Co., 139 Ga. 726 17

United Railways & Electric Co. v. Mayor of Baltimore, 127 Md. 660; 96 Atl. 880 17

IN THE

Supreme Court of the United States

GEORGIA RAILWAY & ELECTRIC CO.,
GEORGIA RAILWAY & POWER CO., and
GEORGIA POWER COMPANY,
Appellants,

v.

CITY OF DECATUR,
Appellee.

No. 625
October Term, 1935.

REPLY BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

I.

Appellee's Brief, Pages 2-6, Incorrectly Asserts That "The Mandate (of This Court) While Reversing the Judgment of the Supreme Court of Georgia, Left the Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties."

The decisions of this Court cited in appellee's brief state the principle that "the questions in terms discussed and de-

cided" by this Court are controlling and binding upon the inferior court as the law of the case. For instance, in *Hartford Life Insurance Co. v. Blincoe*, 255 U. S. 129, this Court held:

> "In determining how far a decision of this court reversing a judgment of a state court binds that court on a second trial, the principle of res judicata, that all that might have been decided is presumed to have been decided, is inapplicable; and only *those matters* which were, not merely presented and argued here, *but actually considered and decided by this court, are foreclosed.*" (Italics ours.)

Of course, "the opinion of this Court may be considered to ascertain exactly what was decided and settled."

Ex Parte Union Steamship Co., 178 U. S. 317.

The further proceedings in the State court cannot be "inconsistent with the opinion of this court."

Sneider Granite Co. v. Gas Realty Co., 245 U. S. 288, 290.

What was formerly considered and decided by this Court in the first appeal has been discussed in appellants' original brief. Pages 13–22.

II.

Sections III and IV (Pages 6-12), of Appellee's Brief, Erroneously Contend that "The Supreme Court of Georgia was not Precluded Either by the Decision of this Court or by the Rule of 'The Law of the Case' from Construing the Statutes and Ordinances as it Did in its Last Decision."

The legal principle that the Supreme Court of the United States accepts the construction by the highest court of the State of a statute of such State is fully recognized. When the construction of a State statute arises this court deter-

mines how such statute has been construed by the State court and then renders a judgment with reference to this question.

The construction of the Georgia statutes was before this court on the first appeal. This question was discussed and considered by this court and a judgment rendered on this question, which judgment was final and conclusive in the case in which it was rendered.

In *Ex Parte Sibbald*, 12 Peters 488, 492, this court held:

> "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. 1 S. C. 194, 197; 1 H. & M. 557; 3 Munf. 229. *After a mandate, no rehearing will be granted.* It is never done in the house of lords; 3 Dow. P. C. 157; and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. 5 Cranch, 316; 7 Wheat. 58, 59; 10 Wheat. 443." (Italics ours.)

In the case of *Washington Bridge Co. v. Stewart*, 3 How. 413, 425, this Court held that it has no power to review its decision; and after the expiration of the term at which it was rendered, it becomes finally binding and conclusive though rendered by a divided court. In that case, this court, after stating that it only had appellate jurisdiction over final decisions of inferior courts, held:

> "The want of power in this court, to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question. * * * A final judgment of this court is supposed to be conclusive upon the rights it decides, and no statute has

> provided any process by which this court can reverse its judgment. In several cases formerly adjudged in this court, the same point was argued and expressly overruled. It was solemnly held, that the final decision of this court was conclusive upon the parties, and could not be re-examined."

See also *Wetmore v. Karrick, 205 U. S. 141, 157.*

In the same case and after this Court has issued its mandate, it will not change or alter its former decision rendered therein.

If this Court will not grant a re-hearing as to questions heard and decided by it after its mandate is issued, can the inferior or State court exercise a greater power or authority over this court's decisions than it will itself exercise? Every previous decision of this court on this subject has refused to permit the State or inferior court to exercise any such power, jurisdiction or authority. (See cases cited in appellants' original brief, pages 14–15).

In *Durant v. Essex Company*, 101 U. S. 555, 566, this Court held that the inferior court "has no power to rescind or modify what we have established. Our judgment by divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous."

In *Hickman v. Ft. Scott*, 141 U. S. 415, a judgment of an inferior court had been reversed. When the case was remanded to the inferior court, there was an application by petition "to make a case materially different from that presented to the court of review." This Court held that the lower court had no power to entertain such motion, and held:

> "We know of no precedent for such a proceeding as this, nor is there any principle of law upon which it could be based. * * * So strongly has this principle been applied by this Court that, while realizing that *there is*

> *no court which can review its decisions*, it has invariably refused all applications for a rehearing made after an adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." (Italics ours.)

In *Mackall v. Richards*, 116 U. S. 45, 47, after this Court had considered and passed upon an appeal in said case and after its mandate was received by the inferior court, a motion was made to set up new matters. This Court held that such motion was properly denied. No discretion was left in the inferior court to grant such motion.

In *Gaines v. Rugg*, 148 U. S. 228, 239, it was contended the inferior court had a right "to proceed in the case, in the language of the mandate not merely 'in conformity with the opinion and decree of this court' but also 'according to right and justice.' * * * In other words, that the whole controversy was to be reopened as if it never had been passed upon by this court." This Court held: "This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

In *Home Street Railway Co. v. City of Trenton*, 162 Fed. 133 (2); 137 (2), the United States Circuit Court of Appeals, Eighth Circuit, in a decision rendered by Judge Van De-Vanter, held that the inferior court (Circuit Court of the United States) "is without authority to correct a judicial error in one of its decrees upon simple motion or petition after the term at which the decree was rendered." (See authorities cited and collected on Page 137 of said opinion.)

See also: *United States v. Mayer*, 235 U. S. 55, 67.

Under the Constitution of Georgia the Supreme Court of Georgia has no original jurisdiction.

Said Constitutional provision, codified in Code of 1910, Section 6502; Code of 1933, Section 2-3005, provides:

> "The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors of law," etc.

The Constitution of the State of Georgia requires the Supreme Court to dispose of every case at the first or second term after writ of error is brought. This Constitutional provision, codified in Code of 1910, Section 6503; Code of 1933, Section 2-3006, provides:

> "The Supreme Court shall dispose of every case at the first or second term after such writ of error is brought;" etc.

After the adjournment of the term of court in which a decision is rendered "no motion for a rehearing will be considered by this (Supreme Court of Georgia) court unless the same is filed in the office of the clerk thereof during the term at which the judgment sought to be reviewed was rendered."

Code of 1910, Section 6257; Code of 1933, Section 24–4544

After this Court has considered and decided the questions brought before it in a former appeal, the inferior court has no power or authority to again consider what has been passed upon and held by this Court. It is bound by the judgment, opinion and decree of this Court and "cannot vary it or examine it for any other purpose than execution, or give any other or further relief; *or review it*, even for apparent error upon any matter decided on appeal."

In Re Potts, 166 U. S. 263, 265.

The cases cited in appellee's brief, pages 9-12, are not applicable to the case at bar. In each of those cases the changed construction of a State statute by the State court arose in another and different case than that in which this Court had rendered a decision. In no case has this Court

itself changed or altered its former decision made in the same case, nor has it permitted the inferior court to review or change what has been decided by this Court on a former appeal.

The case of *Messinger v. Anderson*, 225 U. S. 436, repeatedly cited by appellee, is not in point. That case involved the construction of a will affecting title to property located in a State. The Circuit Court of Appeals had construed the will in a certain manner. Subsequent thereto the State court adopted a different construction of the will. An appeal was taken to this Court, one of the exceptions being that the Circuit Court of Appeals had erroneously construed the will. This Court had never considered or passed upon such question nor rendered any decision with reference thereto. This Court adopted and followed the State court's construction of the will, holding that in any conflict between decisions of the State and Federal Courts, this Court is free when the case *comes before it*, to decide such question. In that case this Court did not change, alter or modify any previous decision rendered by it in the same case.

III.

Reserved Power of State to Amend or Appeal Appellants' Charters and of the Police Power of the State are not Involved.

Appellee's contentions on these questions were before this Court on the first appeal and the decision of this Court with reference thereto is the law of the case. (However these questions are discussed in Appendix "A" to this reply brief.)

The cases of this Court cited on pages 15–17 of appellee's brief are cases in which the Supreme Court of a State had held that certain general acts of the State Legislature there

construed were amendments or alterations of the *utility's charter* and, therefore, such amendments placed *charter* obligations upon the street railway company. In the case at bar, the Supreme Court of Georgia could not hold and did not hold that the local acts amending the charter of the *municipality of Decatur* was an amendment to appellants' charter.

IV.

Contention of Appellee That the Decision of the Supreme Court of Georgia Rests Upon an Independent, Non-Federal Ground of Estoppel (Section IX, Pages 18-23 of Appellee's Brief) is not Well Founded.

The jurisdiction of this Court to review a judgment of a State court, the effect of which is to deny a federal right, cannot be avoided by placing such judgment on non-federal grounds which are plainly untenable.

Ward v. Board of Commissioners of Love County, 253 U. S. 17.

The doctrine of estoppel is not only plainly untenable in the case at bar, but to invoke such doctrine denies appellants due process of law for they never had any legal hearing on this question:

(a) No question of estoppel was raised by the pleadings.

"An issue not made by the pleadings of either party is not before the court."

Keystone Pecan Co. v. Clark, 149 Ga. 836.

(b) There was no evidence in the case establishing an estoppel.

"No estoppel against the plaintiffs can arise on account of the fact that the pavement was completed

before the filing of the petition, especially in view of the evidence, which shows that they filed their written protest against the construction of the work before it was started. 25 Am. & Eng. Law, 1206. * * *

"Provision is made for a remedy by illegality, by which a property owner is afforded a hearing as to the reasonableness or lawfulness of the assessment before he is finally required to pay the assessment. Having such a remedy, the property of abutting landowners is not taken without due process of law."

Sanders v. Mayor, etc., of Gainesville, 141 Ga. 441, 444, 445.

(See also original brief of appellants, pages 22–28.)

The general rule of law is that parties are bound in the appellate court by the case made by the pleadings and the evidence and cannot urge questions not presented in the lower court.

(c) The appellee never raised or urged the question of estoppel against appellants in the trial court.

(d) The doctrine of estoppel was not urged by appellee when this case was first before the Supreme Court of the State of Georgia.

(e) The doctrine of estoppel was not raised upon the first appeal of this case to this Court.

(f) The principle of estoppel was not set out or urged by appellee in the motion made by it to the Supreme Court of Georgia requesting further consideration of this case after the mandate of this Court was issued. (See record, pages 162–165.)

A failure of a party to make a contention is, generally speaking, equivalent to making it and having it overruled or waiving it.

Gila Reservoir Co. v. Gila Water Co., 205 U. S. 279, 264.

United States v. New York Indians, 173 U. S. 464, 471.

After the Supreme Court of the State of Georgia rendered its decision in this case on September 18, 1934, and said decision was brought to this Court for review, it lost jurisdiction over the case. The claimed notice which appellee gave appellants, seeking to have the Supreme Court again take jurisdiction of the case, does not set out, claim or raise the question of estoppel.

(See Record, pages 162–165.)

If any proper or legal notice had set up or claimed estoppel against appellants, appellants could have shown that in previous litigation between the parties, and with reference to the very same assessment to be collected against appellants, appellee had successfully contended that appellants could not be heard to contest the assessment or raise the question of their liability therefor until the municipality undertook to collect the same against appellants.

(See Appendix "A" to original brief of appellants.)

Appellants were given no notice of any claim of estoppel and were given no hearing with reference thereto and, therefore, the judgment rendered on the basis of estoppel by the Supreme Court of Georgia is void and was a denial to appellants of the due process of law.

In the case of *Wetmore v. Karrick*, 205 U. S. 141, 142; 157, 158, this Court held:

> "The question here involved pertains to a case where no notice was given and a new and different judgment is entered at a subsequent term. It is urged when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the rule that jurisdiction once lost

can only be regained by some proper notice, the case at bar is an illustration that such action may impair the substantial right of the party to be heard against the rendition of a new judgment against him."

See also: *Home Street Railway Co. v. City of Lincoln*, 162 Fed. 133, (4), (5), and what is said on page 138, where the court holds that the proceeding there undertaken violated "the fundamental principles of due process of law."

As heretofore shown (pages 5 and 6 of this reply brief), under the Constitution of the State of Georgia the Supreme Court of that State has no original jurisdiction and must dispose of all cases at the first or second term after writ of error is brought. Further, under the statutory law of Georgia, no motion for a rehearing will be considered by the Supreme Court of Georgia unless the same is filed during the term at which the judgment sought to be reviewed was rendered.

In this connection see: *Brooks v. Railroad Co.*, 102 U. S. 107.

Upon the return of this case to the Supreme Court of Georgia, under the mandate of this court, the question of estoppel was not before the said Georgia Supreme Court.

Illinois v. Illinois Central Rd. Co., 184 U. S. 77; 92.

APPENDIX "A"

The State's Reserved Power to Alter or Amend Private Charters and the Question of Police Power of the State is not Involved in the Case at Bar.

The Legislative Acts in question were neither an amendment nor an attempted amendment to Appellants' charter.

The special local acts in question, amending the charter of the City of Decatur, are not amendments to the charter of the Georgia Power Company or of Appellants. The Constitution of the State of Georgia, Art. 3, Section 7, Par. 18 (Georgia Code 1910 Section 6446; Code 1933, Section 2-1818; Code 1933, Sec. 22-201) prevents the Legislature of Georgia itself from granting charters by special acts to appellants. This constitutional provision is as follows:

> "General assembly shall have *no* power to grant corporate powers and privileges to private companies. * * * All corporate powers and privileges to * * * railroad * * * companies shall be issued and granted by the Secretary of State in such manner as shall be prescribed by law; and if in any event, the Secretary of State shall be disqualified to act in any case, then in that event the legislature shall provide by general laws by what person such charters shall be granted."

In this connection see—

> 14 C. J. "Corporations," page 95, Section 58; page 116, Section 106.

Under State constitutional provisions a special Legislative act undertaking to grant a charter to a street railway company would be unconstitutional.

Any amendment to or change in the charter of street railway companies must be made under the same authority as is necessary for its creation in the first instance. Charters of street railway companies cannot be amended except under constitutional provisions relating to its creation.

14 C. J. "Corporations," page 182, Section 184.

Any amendment to or change in appellants' charters must be made by the Secretary of State under general laws.

The Constitution of the State of Georgia, Art. 1, Sec. 4, Par. 1 (Code 1910, Section 6391; Code 1933, Section 2-401), provides:

> "No general law affecting private rights shall be varied in any particular case by *special* legislation, except with the free consent in writing, of all persons to be affected thereby * * * *."

In *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 697, 698, this Court held:

> "The clause in that act (referring to a State's reserved power of amendment or repeal) declaring that 'no alteration or amendment to the charter of the gas company shall be made without the consent of the city council and the directors of the gas company,' plainly expresses, we think, the intention that the company's charter should not be amended or repealed 'at the will of the legislature.'"

The charters of appellants could not be changed, modified or affected by the special local acts in question which merely amend the municipal charter of Decatur.

The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 8 (Code 1910, Section 6437; Code 1933, Section 2-1808), provides:

> "No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof."

The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 17 (Code Section 1910; Section 6445; Code 1933, Section 2-2503), provides:

> "* * * the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made."

The charters of appellants were not referred to either in the title or body of the acts in question.

Even a general statute does not constitute an amendment to a charter of a corporation unless it corrects, improves, reforms, rectifies or alters something in the original charter. A general law, even applicable to all corporations, is not an amendment to their charters where it is not explicitly so declared by the legislature.

> *Chicago, etc., R. Co. v. Wisconsin Rd. Commission,* 237 U. S. 220, 234.

Cases dealing with the reserved right of the State to amend corporate charters by enacting general laws and thereby imposing charter obligations are not applicable to the local statutes in question for they were not and could not be construed as an amendment or alteration of any of appellants' charters.

There has never been any contention in this case that the legislature did not have a right to amend the municipal charter of the City of Decatur. There is no contention of any constitutional violation of the obligation of contracts. An amendment of Decatur's municipal charter does not create a charter obligation against appellants for their charters are not affected by such local act.

Appellants' contention is that they are entitled to the same and equal constitutional protection accorded others and that assessments for local improvements can not be made or sustained as against them on some other basis than that applied to other property owners.

Cases Dealing With Police Power and Regulation are not Applicable.

In the opinion of the Supreme Court of Georgia rendered on September 30, 1935, the court held that the authority of the Legislature to enact the assessment statute in question "comes both within the taxing and police power reserved in the State." The authority or power of the State to enact the statutes is not questioned. The Courts have generally agreed that the authority to require the *property* specially benefited to bear the expense of local improvements is a branch of the taxing power.

The Court in *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 343, held:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited. * * *"

In the case of *City of Augusta v. Augusta-Aiken Ry. & C. Corporation*, 150 Ga. 529, the Supreme Court held that a similar local assessment statute applicable to the City of Augusta, Georgia, was an exercise of the taxing power. In this case the court held that special municipal paving assessments against street railway companies for a portion of the costs of paving a street in which the tracks are located is an exercise of the taxing power and not of the police power. In this case a contract relieving the street railway from the assessment was upheld as legal and valid. A municipality cannot make a valid contract affecting or surrendering its police power. In holding that the contract was not a surrender of the City's police power, the court expressly held that such special assessments against street railway companies were not made under the police power conferred upon a municipality.

The court on page 532 (150 Ga.) held:

> "While the act of the city in laying street paving assessments is the exercise of the taxing power in a general sense, such assessments are not taxation within the meaning of the constitutional provision requiring taxation to be ad valorem and uniform."

That the Acts in question are not a police regulation is shown by the provisions of the Act.

(a) They are revenue acts and not regulatory acts.

(b) They do not require property owners or street railway companies to construct or make any improvements.

(c) The statutes authorize the commissioners of the municipality (City of Decatur) "to grade, regrade; pave, repave; build, rebuild, or otherwise *improve* or *reimprove* any of the streets," etc.

(d) The acts are revenue acts authorizing *the city* to make *improvements* and *raise funds for the improvements it* makes.

(e) The assessments are made a general lien upon property from the time of the passage of the assessment ordinance.

(f) The city clerk is authorized to issue an execution for the amount of the special assessment.

(g) The execution is to be levied "as in the case of sales of realty for city taxes."

(h) The lien for this special tax is given priority next to the lien for general taxes.

In the *City of Brunswick v. Gordon Realty Company*, 163 Ga. 636, 641, the Supreme Court of Georgia held:

> "As the issuance of an execution creates a lien under which the municipal authorities may seize and sell the property improved, it follows further that in doing

these acts, that is, in issuing the execution, seizing and selling under it, the municipality exercises the *taxing* power."

(i) The acts in question are not based upon any claimed police power or authority vested in the municipality. They provide that it is "additional and cumulative to other provisions now in force and in effect in said city."

Special attention is called to the case of *United Rwys. & Elec. Co. v. Mayor of Baltimore*, 127 Md. 660; 96 Atl. 880.

See also:

Fielders v. N. Jersey Street R. Co., 53 Atl. 405, 54 Atl. 822; 68 N. J. L. 343, 59 L. R. A. 455,

where the court held that special paving assessments against street railway companies occupying the streets were an exercise of the taxing power and could not be supported under the claim of a police regulation.

See also:

City of Knoxville v. Knoxville Power & Lt. Co., 68 S. W. (2d) 936.

In Georgia, street railway companies do not impose an additional burden upon the streets.

Southern Ry. Co. v. At. Ry. & Power Co., 111 Ga. 679.

Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 152.

Southern Ry. Co. v. Rome Ry. & Lt. Company, 139 Ga. 726.

The paving in question was not done by the City of Decatur under any police power of the City of Decatur.

It had police power in its original charter. The paving was done under an act giving the Municipality the right "*to improve the streets.*" The acts provided that it was "additional and cumulative to other provisions now in force and effect in said city." The power given to the Municipality to assess other property owners is based exclusively upon corresponding benefits. Under the equal protection clause of the Federal Constitution appellants and their property are entitled to the same protection.

Respectfully submitted,

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Attorneys for Appellants.

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DEC 9 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 625

GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JAMES A. BRANCH,
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INDEX.

SUBJECT INDEX.

	Page
Statement of City of Decatur, Appellee, opposing jurisdiction, and motion to dismiss or affirm	1
Statement of the case	2
Argument and citation of authorities in support of motion	3

TABLE OF CASES.

Baccus v. Louisiana, 232 U. S. 334, 337	8
Central Vermont Railroad Company v. White, 238 U. S. 507, 513	9
Clark v. Williard, 294 U. S. 211	5, 8
Clark v. Williard, 292 U. S. 112	8
Durham Public Service Company v. City of Durham, 261 U. S. 149	6
Fair Haven & Westville Railroad Company v. City of New Haven, 203 U. S. 379	6
Farncomb v. City of Denver, 252 U. S. 7, 10	8
Fort Smith Light & Traction Company v. Board of Improvements of Paving District No. 16 of Fort Smith, 274 U. S. 387	6
General Investment Company v. Lake Shore & Michigan Southern Railway Company, 260 U. S. 261, 284	4, 9
Georgia Railway & Electric Company v. Decatur, 295 U. S. 165	2, 5
Hartford Life Insurance Company v. Blincoe, 255 U. S. 129, 134	4, 9
Mackay Telegraph Company v. City of Little Rock, 250 U. S. 94	8
Mutual Life Insurance Company v. Hill, 193 U. S. 551, 553	4
St. Louis & Kansas City Land Company v. Kansas City, 241 U. S. 419, 427	8, 9
Schneider Granite Company v. Gast Realty & Investment Company, 245 U. S. 288, 290	5
Sioux City Street Railway Company v. Sioux City, 138 U. S. 98	6
Ward v. Board of County Commissioners of Love County (Okla.), 253 U. S. 17, 25	5
Wolff Packing Company v. Court of Industrial Relations (Kansas), 267 U. S. 552, 562	4

STATUTES CITED.

Code of Georgia, 1933, Section 94-1002	7
Georgia Laws, 1919, page 934, et seq.	4, 6
Georgia Laws, 1924, page 534, et seq.	4, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 625

GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

STATEMENT OF CITY OF DECATUR, APPELLEE, OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

To the Honorable the Chief Justice of the United States and the Associate Justices:

Now comes the City of Decatur, appellee in the above stated cause, and, in pursuance of Rule 12 (3) of this Court, files this its statement against the jurisdiction of this Court asserted by the appellants; and, acting under Rule 7 (3) and (4) of this Court, moves the Court to dismiss the appeal in said cause or affirm the decision of the lower court.

The statement opposing jurisdiction, and the motion to dismiss or affirm, are based upon the grounds:

a) That there is no substantial Federal question involved; and,

b) That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

All of the Federal questions raised by the assignment of errors have been settled by numerous decisions of this Court, as will be pointed out in the following statement and brief.

Statement of the Case.

The case was before this Court and was decided on April 29th, 1935 (*Georgia Railway & Electric Company* v. *Decatur*, 295 U. S. 165). It was reversed and remanded to the lower court (The Supreme Court of Georgia) for further proceedings not inconsistent with the opinion of this Court. The Judgment of the state supreme court was reversed for the sole reason that this Court construed the opinion of the state court as having held that the state statute which authorized, and the ordinance which directed, assessments against street railway companies for the cost of paving portions of streets occupied by the tracks of such companies required, as the basis for their operation, the existence of benefits, and that under this construction of the statute and ordinance the refusal of the state court to receive evidence of lack of benefits to such street railway companies amounted to a denial of due process of law. When the case was remanded to the Supreme Court of Georgia for further proceedings, not inconsistent with the opinion of this Court, the City of Decatur (the appellee) made a motion in that court (which motion was duly served upon the appellants)

for that court to further consider and to pass upon the questions which had been raised and argued before that court and which had not then been passed upon by it, including the question whether the state law, and the ordinance, under which the assessment in question had been made were sustainable under the police power of the state and under the reserved power to alter or amend corporate charters, irrespective of special benefits to the street railway companies occupying with their tracks portions of the street improved. The appellants filed a response to this motion and the state supreme court, after considering the motion, and the response, rendered an opinion and judgment holding that the state law, and the ordinance passed in pursuance thereof, under which the assessment in question was made was a valid exercise of the power expressly reserved in the state to alter and amend corporate charters and of the police power of the state; and that under a statute of Georgia (Code of 1933, section 94-1002) which, in effect, became a part of the franchise under which the appellants constructed and operated their lines in the City of Decatur, the appellants were liable for the assessment in question, irrespective of any special benefits to them, or their property, from the street improvement for which the assessment was made. The Supreme Court of Georgia further held that the appellants are precluded and estopped from attacking the assessment in question, because they did not act promptly and in accordance with well established methods of procedure under Georgia law.

Argument and Citation of Authorities in Support of Motion.

The judgment of the Supreme Court of Georgia, from which the appeal is taken, is not inconsistent with the opinion rendered by this Court on April 29th, 1935. In that opinion, this Court held that the judgment of the Su-

preme Court of Georgia affirming the judgment of the Superior Court of Fulton County was erroneous for the reason, and solely for the reason, that the Supreme Court of Georgia had held that there was no error in the ruling of the trial court in excluding, as immaterial, evidence to the effect that the street improvement in question, for which the assessment against the appellants was made, did not benefit the property of the appellants. This ruling of this Court was based solely upon the fact that this Court construed the decision of the Supreme Court of Georgia as holding that the statutes under which the assessment was made (Georgia laws, 1919, page 934 *et seq.*; Georgia laws, 1924, page 534 *et seq.*) require, as a basis of their operation, the existence of benefits. The decision of this Court reversed the judgment of the Supreme Court of Georgia and remanded the case "for further proceedings not inconsistent with" the opinion.

The effect of the reversal was to leave the state court free to take further action and proceedings in the cause, provided such further proceedings were not inconsistent with the opinion of this Court. The court below was not given any directions as to what further proceedings should be taken. This Court did not itself construe the state statutes, but expressly recognized that this was for the supreme court of the state to do.

> "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."
>
> *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551, 553;
>
> *Wolff Packing Company* v. *Court of Industrial Relations* (Kans.), 267 U. S. 552, 562;
>
> *General Investment Company* v. *Lake Shore & Michigan Southern Railway Company*, 260 U. S. 261, 284;
>
> *Hartford Life Insurance Company* v. *Blincoe*, 255 U. S. 129, 134.

The opinion of this Court, rendered April 29th, 1935, (*Georgia Railway & Electric Company* v. *Decatur*, 295 U. S. 165) did not preclude the Supreme Court of Georgia from further construing the state statutes under which the assessment was made.

> "The mandate while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this Court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties."
>
> *Schneider Granite Company* v. *Gast Realty & Investment Company*, 245 U. S. 288, 290;

To the same effect, see:

Ward v. *Board of County Commissioners of Love County (Okla.)*, 253 U. S. 17, 25;

Clark v. *Williard*, 294 U. S. 211.

This Court did not construe, or undertake to construe, the Georgia statutes, but construed the opinion and decision of the Supreme Court of Georgia.

The mandate of the Supreme Court of the United States did not require that the cause be remanded to the trial court. The further proceedings to be taken in the cause were left to the State courts.

Schneider Granite Company v. *Gast Realty & Investment Company*, 245 U. S. 288, 291.

The further proceedings in the Supreme Court of Georgia, after the case was remanded, were had after due notice was given to the appellants. Said proceedings were had upon a motion, duly filed by the City of Decatur and served upon the appellants (Record, page —). "The Power Company resisted this motion" before the Supreme

Court of Georgia (See opinion of the Supreme Court of Georgia, Record, page —).

Under the State statutes authorizing the assessment against the appellants (Georgia laws, 1919, page 934 *et seq.;* Georgia laws, 1924, pages 534 *et seq.*), as now construed by the Supreme Court of Georgia, the question of benefits, or lack of benefits, to the property of the appellants is immaterial.

Fort Smith Light & Traction Company v. *Board of Improvements of Paving District No. 16 of Fort Smith,* 274 U. S. 387;

Fair Haven & Westville Railroad Company v. *City of New Haven,* 203 U. S. 379;

Sioux City Street Railway Company v. *Sioux City,* 138 U. S. 98;

Durham Public Service Company v. *City of Durham,* 261 U. S. 149.

In the opinion, delivered in this case on April 29th, 1935, this Court, in effect, recognized the above stated principle. From the opinion we quote the following:

> "In this court, the city insists that, under Georgia law, 'The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved'. And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the state to alter or amend corporate charters. If the Georgia statutes had been thus construed by the state supreme court, a different question would be presented."

A statute of Georgia, which was of force when the appellants constructed their street car lines in the City of

Decatur (Code of Georgia of 1933, section 94-1002) provides that:

> "No street railroad or interurban railroad incorporated under this Chapter shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: and Provided further, that all railroad companies incorporated under this Chapter shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them with reference to the railroad or the portion thereof located within the limits of said municipal corporation."

The Supreme Court of Georgia, in its opinion in the case at bar, cites this statute and holds:

> "When the Georgia Power Company accepted its charter and with the consent of the city entered on its streets with its railway-tracks, it did so subject to the general law of the State and to the power of the State to amend the city charter by further legislation dealing with the upkeep of the streets. Under its laws the State reserves the power and authority to withdraw, alter, or amend private charters. Under the laws of this State this legislation was authorized. The Code of 1933, section 79-101, provides: 'Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations.' 'In all cases of private charters granted since January 1, 1863, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.' Section 22-1202.
>
> "So when the Georgia Power Company was organized and with the consent of the city entered on the streets with its railway-tracks, it did so subject to the general law of the State and the power of the State to amend the city's charter by further legislation with

respect to the upkeep of the streets. *Atlantic & Gulf R. Co.* v. *State*, 98 U. S. 359; *West End & Atlanta Street R. Co.* v. *Atlanta Street R. Co.*, 49 Ga. 151; *Fort Smith Light, &c., Co.* v. *Board of Improvement*, 274 U. S. 387; *Fair Haven, &c., R. Co.* v. *New Haven*, 203 U. S. 379; *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98; *Union Branch R. Co.* v. *E. T. & G. R. Co.*, 14 Ga. 327."

This Court accepts the State court's construction of statutes of the State.

Clark v. *Williard*, 292 U. S. 112, and same case, 294 U. S. 211.

St. Louis & Kansas City Land Company v. *Kansas City*, 241 U. S. 419, 427, where this Court said:

> "The extent of the authority conferred upon the city by its charter, the construction of the various provisions of the charter, the validity, scope, and effect under the state law of the ordinances adopted by the city, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions, as to which the decision of the state court is controlling."

Also, to the same effect, see:

Farncomb v. *City of Denver*, 252 U. S. 7, 10;
Baccus v. *Louisiana*, 232 U. S. 334, 337;
Mackay Telegraph Company v. *City of Little Rock*, 250 U. S. 94.

The Supreme Court of Georgia in the decision, which is now sought to be reviewed, held that the appellants are estopped from now attacking the validity of the assessment because they had knowledge of the fact that the improvement was to be made, and that they would be called upon to pay their proportionate part of the cost for such im-

provement, but took no affirmative action to question the necessity or propriety of the improvements being made and, according to well settled principles of procedure under Georgia law, they are estopped by reason of their laches. A number of decisions of the Supreme Court of Georgia establishing this principle are cited in the opinion.

This Court accepts the decision of the highest court of the State as to matters of State practice and procedure.

St. Louis & Kansas City Land Company v. *Kansas City*, 241 U. S. 419, 427;

Central Vermont Railroad Company v. *White*, 238 U. S. 507, 513;

Hartford Life Insurance Company v. *Blincoe*, 255 U. S. 129;

General Investment Company v. *Lake Shore & Michigan Railway*, 260 U. S. 261, 284.

WHEREFORE, City of Decatur respectfully prays that this Court determine that there is no substantial Federal question involved in this appeal, and that the questions raised by the appeal are so unsubstantial as not to need further argument, and that the appeal be dismissed or the judgment of the lower court affirmed.

December 4, 1935.

JAMES A. BRANCH,
WM. SCHLEY HOWARD,
SCOTT CANDLER,
Counsel for City of Decatur.

(7229-C)

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IN THE

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OCTOBER TERM, 1935

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THE GEORGIA RAILWAY AND ELECTRIC COMPANY, GEORGIA RAILWAY AND POWER COMPANY, and GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

BRIEF OF APPELLEE, CITY OF DECATUR.

JAMES A. BRANCH,
WM. SCHLEY HOWARD,
SCOTT CANDLER,
Attorneys for Appellee.

SUBJECT INDEX

Pages

List of cases, and statutes cited in brief:

Jurisdiction 1

The Decision of the Supreme Court of Georgia, Now Under Review, Is Not Inconsistent With the Mandate and Opinion of This Court. The Mandate, While Reversing the Judgment of the Supreme Court of Georgia, Left the Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties..... 2

The Supreme Court of Georgia Was Not Precluded Either by the Decision of This Court or by the Rule of "The Law of the Case" From Construing the Statute and Ordinance as it Did in its Last Decision 6

The Supreme Court of the United States Accepts the Construction by the Highest Court of the State of a Statute of Such State; and the Last Construction of Such Statute by the Highest Court of the State is Accepted, Even Though the Statute Had Formerly Been Given a Different Construction 9

The Statutes (Ga. Laws 1919, pp. 934 et seq; Ga. Laws 1924 pp. 534 et seq.), Which Authorized the Assessments Against Appellants for a Part of the Cost of Improving the Streets Occupied by Their Tracks, as Construed by the Supreme Court of Georgia, Do not Require, as the Basis for Their Operation, the Existence of Special Benefits to the Property of Appellants..... 13

The Statutes Under Which the Assessment Against the Appellants Was Made, as Construed by the

Supreme Court of Georgia, Does Not Deprive Appellants of Any Right Guaranteed Them by the Constitution of the United States; But Such Statutes are Valid as an Exercise of the Power Reserved by the State to Alter or Amend Private Charters, and of the Police Power of the State.... 14

No Unfair Discrimination Against Appellants..... 17

The Fact That the Appellants, Because of the Five-Cent Fare Contract, Cannot Operate This Line at a Profit Affords No Reason for Relieving Them from the Payment of the Assessment..... 18

The Decision of the Supreme Court of Georgia Rests Upon an Independent Ground Not Involving a Federal Question and Broad Enough to Maintain its Judgment; That is, Upon the Ground of Estoppel; and, Therefore, the Judgment of That Court Should Be Affirmed or the Appeal Dismissed Notwithstanding That There Was Also a Federal Question Involved..... 18

ALPHABETICAL LIST OF CASES AND AUTHORITIES CITED IN BRIEF

	Pages
American Surety Company v. Bankers Savings & Loan Association, 67 Fed. (2d) 803	8
Barney v. Winona & St. P. Railroad Company, 117 U. S. 228	9
Beaupre v. Noyes, 138 U. S. 397	21
Chase v. United States, 261 Fed. 833, 840	6, 7, 8
Chicago, M., St. P. & P. R. Company v. Risty, 276 U. S. 567, 570, 575	9, 12, 22
Clark v. Williard, 292 U. S. 112	6
Clark v. Williard, 294 U. S. 211	6
Durham Public Service Company v. City of Durham, 261 U. S. 149, 154	15, 17
Elmendorf v. Taylor, 10 Wheat. 152, 159	11
Eustis v. Bolles, 150 U. S. 261	22
Ex Parte Union Steamboat Company, 178 U. S. 317, 319	4
Fairfield v. County of Gallatin, 100 U. S. 47	12
Fairhaven & Westville Railroad Company v. City of New Haven, 203 U. S. 379	15, 16
Farncomb v. City and County of Denver, 252 U.S. 7	12
First National Bank v. Board of County Commissioners of the County of Weld, 264 U. S. 450	22
Forsyth v. Hammond, 166 U. S. 506, 518	12
Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387	15, 18
Gaar Scott & Company v. Shannon, 223 U. S. 468	22

	Pages
General Investment Company v. Lake Shore & Michigan Southern Railway Co., 260 U. S. 261	4
General Investment Company v. Lake Shore & M. S. Ry. Co., 269 Fed. 235 (5)	5
Georgia Power Company v. City of Decatur, 168 Ga. 705	20, 21, 23
Georgia Power Company v. Decatur, 281 U. S. 505, 511	21
Georgia Railway & Electric Company v. Decatur, 295 U. S. 165, 170	9
Gillis v. Stinchfield, 159 U. S. 658	21
Great Northern Ry. Co. v. Western Union Telegraph Co., 174 Fed. 321	6
Green v. Neal, 6 Pet. 291, 292, 299	9, 10, 11
Hale v. Akers, 132 U. S. 554	22
Hartford Life Insurance Company v. Blincoe, 255 U. S. 129, 138	5, 12
Hawks v. Hamill, 288 U. S. 52	12
Hayat Carpet Cleaning Co. v. Northern Assur. Co., Limited of London, 69 Fed. (2d) 805	6
Hertz v. Woodman, 218 U. S. 205	7
Higgins v. California Prune & Apricot Grower, 3 Fed. (2d) 896	8
Iowa Central Railway Company v. Walker, 255 Fed. 648	5
Jenkins v. Lowenthal, et al., 110 U. S. 222	21
Johnson v. Cadillac Motor Company, 261 Fed. 878	7
Leathe v. Thomas, 207 U. S. 93	22

	Pages
Leffingwell v. Warren, 67 U. S. (2 Black.) 599, 603	9, 10
Lewers & Cooke v. Atcherly, 222 U. S. 285, 295	7
Mackay Telegraph & Cable Company v. Little Rock, 250 U. S. 94	12
Marine National Exchange Bank v. Kalt-Zimmer Mfg. Co., 293 U. S. 357, 366	12
McGregor v. Hogan, 263 U. S. 234	22
McNee v. Williams, 280 Fed. 95	5
Messinger v. Anderson, 225 U. S. 436, 444	7
Milwaukee Electric Railway & Light Company v. State of Wisconsin, 252 U. S. 100	18
Moran v. Horsky, 178 U. S. 205	22
Mutual Life Insurance Company v. Hill, 193 U. S. 551, 553	4
Northern Pacific R. Co. v. Ellis, 143 U. S. 458	22
Pierce v. Somerset Rwy. Co., 171 U. S. 641, 648	22
Rector v. Ashley, 73 U. S. (6 Wall.) 142	22
Rogers v. Chicago R. I. & P. Railway Company, 39 Fed. (2d) 601	8
Saint Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419	3
Sanford Fork & Tool Co., 160 U. S. 247, 256	4
Schneider Granite Co. v. Gast Realty & Investment Company, 245 U. S. 288, 290, 291	3, 4
Sioux City Street Railway Company v. Sioux City, 138 U. S. 98, 106, 107	15, 16, 17
Sioux County v. National Surety Co., 276 U. S. 238	12

	Pages
Southern Railway Company v. Clift, 260 U. S. 316, 319	7
Speed v. McCarthy, 181 U. S. 269	22
Supervisors of Carroll County v. United States, 85 U. S. (18 Wall.) 71	12
E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co., 191 Fed. 543	5
Texas v. Pensacola Maritime Corporation, 292 Fed. 61	8
United States v. Morrison, 4 Pet. 124	10
Ward v. Board of County Commissioners of Love County, 253 U. S. 17, 25	5
Williams v. Order of Commercial Travelers of America, 41 Fed. (2d) 745	8
Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552, 562	5

STATUTES CITED

Georgia Laws 1919, Page 934 et seq.	13, 21
Georgia Laws 1924, Page 534 et seq.	13, 21

IN THE
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GEORGIA RAILWAY AND ELECTRIC COMPANY,
GEORGIA RAILWAY AND POWER COMPANY,
and GEORGIA POWER COMPANY

APPELLANTS

vs.

CITY OF DECATUR

APPELLEE

BRIEF OF APPELLEE.

I.

JURISDICTION.

Appellee filed a statement opposing jurisdiction and a motion to dismiss or affirm upon the grounds:

(a) That there is no substantial Federal question involved; and,

(b) That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

A brief in support of said motion was also filed.

In addition to the reasons set forth in the motion and brief above referred to, we urge the reasons, and rely upon the authorities, set out in section IX of this brief.

We respectfully insist upon said motion for the reasons set forth in the brief filed in support thereof and in this brief.

II.

The Decision of the Supreme Court of Georgia, Now Under Review, Is Not Inconsistent With the Mandate and Opinion of This Court. The Mandate, While Reversing the Judgment of the Supreme Court of Georgia, Left the Tribunals of the State at Liberty to Exercise Their Proper Jurisdiction in the Case Between the Parties.

The case was remanded to the Supreme Court of Georgia "for further proceedings not inconsistent with the opinion of this Court." (Record, page 128.) The mandate is, of course, construed in the light of the opinion of this Court. The opinion (295 U. S. 165) established two propositions only:

first: that the Supreme Court of Georgia, in its former decision, which was then under review, had "held that the state statute which authorized, and the ordinance which directed, an assessment for the cost of improvements require, as the basis for their operation, the existence of benefits"; and;

second: that "under the statute and ordinance *thus construed,*" the refusal of the state court to receive or consider any proof whatever on the subject of benefits, or lack of benefits, amounted to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution.

The decision of this Court did not preclude the supreme court of the state from further considering the case; or from further construing the state statutes and ordinance; or from correcting any error which it may have made in its former decision as to the proper construction of the statutes and ordinance. On the contrary, the case was remanded to that court for further proceedings; and it was at liberty, under the decision of this Court, to proceed in any manner, provided such proceedings were not inconsistent with the decision of this Court.

This Court did not construe, or undertake to construe, the Georgia statutes, but construed the opinion and decision of the Supreme Court of Georgia. This Court has uniformly

recognized that it is the province of the highest court of the state to construe the statutes of such state and that such construction will be accepted by this Court; and this Court recognizes the right of the highest court of the state to change its construction of the statutes of the state, and the last construction of such statutes by the highest court of the state is accepted as the true construction. See authorities on this proposition, section IV of this brief.

The mandate of this Court did not require that the cause be remanded to the trial court. In the assignment of errors (Record, page 151) and in their brief, appellants contend that the opinion and mandate "ordered a reversal" and that the state supreme court was therefore required by this Court to reverse the decision of the trial court and remand the case to the trial court. The mandate contains no such direction (Record, page 127, et seq.). The further proceedings to be taken in the cause were left to the state courts.

Schneider Granite Company v. Gast Realty & Invest. Company, 245 U. S. 288, 291.

These are state questions as to which the decision of the state court is controlling.

St. Louis & K. C. Land Co. v. Kansas City, 241 U. S. 419.

The further proceedings in the Supreme Court of Georgia, after the case was remanded, were had after due notice was given to the appellants. In the assignment of errors (Record, page 153) appellants allege: "The Supreme Court of the State of Georgia * * * without notice to the Georgia Railway & Electric Company, Georgia Railway & Power Company and Georgia Power Company, entered a judgment of affirmance in said case." The record shows the contrary. A motion was made before the Supreme Court of Georgia for further consideration of the case and further construction of the statute, and this motion was duly served upon the appellants. (Record, pages 162-165.) This motion, and the acknowledgment of service thereof, were incorporated in the record at the request of the appellee. (Record, pages 161-

162.) "The Power Company resisted this motion" before the Supreme Court of Georgia (Record, page 133).

> "The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court, *(Re Sanford Fork & Tool Co.,* 160 U. S. 247, 256); and the opinion of this court may be consulted to ascertain exactly what was decided."
>
> *Ex parte Union Steamboat Company,* 178 U. S. 317, 319.

> "The mandate while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this Court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties."
>
> *Schneider Granite Company v. Gast Realty & Investment Company,* 245 U. S. 288, 290.

> "While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion, —yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case."
>
> *Mutual Life Insurance Company v. Hill,* 193 U. S. 551, 553.

In *General Investment Company v. Lake Shore & Michigan Southern Railway Company,* 260 U. S. 261, it was held that a

judgment of the Supreme Court of the United States reversing an order dismissing a bill because a person originally made a defendant, but who had been dismissed from the suit, is an indispensable party to the action, does not preclude the lower court from dismissing the bill because not stating a cause of action.

In *Hartford Life Insurance Company v. Blincoe,* 255 U. S. 129, it was held:

> "A decree of the Federal Supreme Court which, upon the ground that full faith and credit were denied to a judgment of a sister state holding that a life insurance company could levy an assessment for a larger amount than was necessary to pay death losses up to the time, reversed a decree of the highest court of another state, holding that a benefit certificate in such company was not forfeited for non-payment of such an assessment, which that court found to be excessive, leaves the latter court at liberty to decide (upon the authority of its previous decisions) on a second appeal following a new trial of the cause that a tax asserted by the Company to have been imposed by the laws of the state had been unlawfully included in the assessment, and that therefore the assessment was void, and that its non-payment did not work a forfeiture of such benefit certificate."

To the same effect, see:

Ward v. Board of County Commissioners of Love County, 253 U. S. 17, 25;

Wolff Packing Company v. Court of Industrial Relations, 267 U. S. 552, 562;

General Investment Company v. Lake Shore & M. S. Ry. Co. (C. C. A. Sixth Circuit), 269 Fed. 235 (5);

Iowa Central Railway Co. v. Walker (C. C. A. Eighth Circuit), 255 Fed. 648;

McNee v. Williams (C. C. A. Eighth Circuit), 280 Fed. 95;

E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co. (C. C. A. Sixth Circuit), 191 Fed. 543;

Great Northern Ry. Co. v. Western Union Telegraph Co. (C. C. A. Eighth Circuit), 174 Fed. 321;

Hayat Carpet Cleaning Co. v. Northern Assur. Co., Limited of London, 69 Fed. (2d) 805;

Chase v. United States (C. C. A. Eighth Circuit), 261 Fed. 833.

In *Clark v. Williard,* 292 U. S. 112, this Court expressly recognized the propriety of the highest court of the state being permitted to pass upon the laws and local policies of the state as expressed in its statutes; and, after reversing the case on other grounds, remanded the case to the Supreme Court of Montana in order that that court might further consider such questions. Mr. Justice Cardozo in the opinion (page 123) said:

> "Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator is a question as to which the Supreme Court of that state will speak with ultimate authority."

Mr. Justice McReynolds, in a separate opinion in that case, (page 139) said:

> "It is not our function to suggest to state courts how they should interpret their own laws."

The case was again carried to the Supreme Court of the United States and the judgment of the Supreme Court of Montana was then affirmed. *Clark v. Williard,* 294 U. S. 211.

III.

The Supreme Court of Georgia Was Not Precluded Either by the Decision of This Court or by the Rule of "The Law of the Case" From Construing the Statute and Ordinance as it Did in its Last Decision.

> "In the absence of statute the phrase 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to re-

fuse to re-open what has been decided, not a limit to their power."

Messinger v. Anderson, 225 U. S. 436, 444.

"The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata;* one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power; in the other, of submission."

Southern Railway Company v. Clift, 260 U. S. 316, 319.

This rule is now well established and is generally recognized.

"What is called the 'law of the case' is only a rule of convenience, generally adhered to, of course, but not necessarily.

"The appellate court by such former decision did not preclude itself from doing justice between the parties; if it should be convinced that its former decision was erroneous." *Messinger v. Anderson,* 225 U. S. 436; *Lewers & Cooke v. Atcherly,* 222 U. S. 285, 295; *Hertz v. Woodman,* 218 U. S. 205."

Chase v. United States, 261 Fed. 833, 840.

"Notwithstanding the rules as to *stare decisis,* and that a decision of an appellate court becomes the law of the case on retrial, the Circuit Court of Appeals may, where former decision in the same case was clearly erroneous, and announced a wrong rule, which might well affect many persons adversely, reverse its earlier decision on writ of error after retrial; the rule as to the law of the case being largely one of convenience and policy."

Johnson v. Cadillac Motor Company (C. C. A. Second Circuit), 261 Fed. 878.

"Decision on former appeal does not deprive court of power to review questions involved and reach another result."

Williams v. Order of Commercial Travelers of America (C. C. A. Sixth Circuit), 41 Fed. (2d) 745.

"An appellate court by its decision does not preclude itself from doing justice between the parties, if on a subsequent appeal it should be convinced that its former decision was erroneous."

Chase v. United States (C. C. A. Eighth Circuit), 261 Fed. 833.

"While the Circuit Court of Appeals has power under special circumstances to re-examine questions decided on previous hearing of same case, decision on former appeal or writ of error is, as a general rule, the law of the case."

Texas v. Pensacola Maritime Corporation (C. C. A. Fifth Circuit), 292 Fed. 61.

"Circuit Court of Appeals will not consider itself bound by law of case if former decision is clearly erroneous or unjust."

American Surety Company v. Bankers Savings & Loan Association (C. C. A. Eighth Circuit), 67 Fed. (2d) 803.

See also:

Higgins v. California Prune & Apricot Grower (C. C. A. Second Circuit), 3 Fed. (2d) 896;

Rogers v. Chicago R. I. & P. Railway Company (C. C. A. Eighth Circuit), 39 Fed. (2d) 601.

The Supreme Court of Georgia, in the decision now under review, says that that court in rendering its former decision did not intend to construe the state statute which authorized, and the ordinance which directed, the assessment to require, as the basis for their operation, the existence of benefits as to a street railway company having tracks in the street improved. This being true, the court ought to have the power to so hold, notwithstanding its unintentional use of language to the contrary effect in its former decision.

Compare: *Barney v. Winona & St. P. Railroad Co.*, 117 U. S. 228.

The case was still pending between the parties and no rights of the parties had been acquired or relinquished by reason of reliance upon the decision. What reason, we respectfully ask, could there be for denying the highest court of the state the power to construe a state law correctly according to its views, even though it had once before given the law an erroneous construction, and one not intended by the court? If this Court had itself construed the state statute and the state supreme court had afterwards given it a different construction, this Court would adopt the latter construction.

Chicago, M., St. P. & P. Railway Company v. Risty, 276 U. S. 567, 570;

Green v. Neal, 6 Pet. 291;

Leffingwell v. Warren, 67 U. S. (2 Black) 599, 603.

The mandate of this Court did not direct the state supreme court to adhere to its own former construction of the statute. It did not command the state court not to correct its own error, if such existed.

IV.

The Supreme Court of the United States Accepts the Construction by the Highest Court of the State of a Statute of Such State; and the Last Construction of Such Statute by the Highest Court of the State is Accepted, Even Though the Statute Had Formerly Been Given a Different Construction.

If, as we insist, the mandate and opinion of this Court did not have the effect of preventing the Supreme Court of Georgia from further considering and construing the statute, then its last decision will be accepted by the Supreme Court of the United States as the true construction of the statute, and that construction becomes a part of the statute as much as though it were found in appropriate words in its text.

Georgia Railway & Electric Company v. Decatur, 295 U. S. 165, 170.

It is the latest construction that is accepted by this Court.

In *Leffingwell v. Warren,* 67 U. S. (2 Black) 599, 603, it was held:

> "The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text * * * If the highest judicial tribunal of a state *adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications. United States v. Morrison,* 4 Pet. 124; *Green v. Neal,* 6 Pet. 291." (Italics ours.)

In *Green v. Neal,* 6 Pet. 291, 292, this Court held:

> "If the construction of the highest judicial tribunal of the State forms a part of the statute law as much as an enactment by the Legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the State government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law, and yet they reject the exposition of that law which forms a part of it. *It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the State, at the time the decision is made?* This constitutes the rule of property within the State, by which the rights of litigant parties must be determined.
>
> "As the federal tribunals profess to be governed by this rule, they cannot act inconsistently by enforcing it. If they change their decision, it is because the rule on

which the decision was founded has been changed." (Italics ours.)

In the opinion, on page 299, Mr. Justice McLean said:

> "Would not a change in the construction of a law of the United States by this tribunal be obligatory on the State courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law by the State Court? The exposition forms a part of the local law, and is binding on all people of the State and its inferior judicial tribunals. It is emphatically the law of the State; which the federal court, while sitting within the State, and this court, when a case is brought before them, are called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the Legislature of the State may modify the law or repeal it."

In *Elmendorf v. Taylor,* 10 Wheat. 152, 159, Chief Justice Marshall said:

> "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by

all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled."

This Court holds itself bound by the decision of the highest court of a state construing a state statute even though that construction is contrary to the weight of authority.

Marine National Exchange Bank v. Kalt-Zimmer Mfg. Co., 293 U. S. 357, 366.

And this is true even though such construction may not accord with this Court's opinion as to the proper construction.

Supervisors of Carroll County v. United States, 85 U. S. (18 Wall.) 71;

Forsyth v. Hammond, 166 U. S. 506, 518;

Hartford Life Insurance Company v. Blincoe, 255 U. S. 129, 138.

And this is also true even though this Court had previously construed the state statute differently.

Chicago, M., St. P. & P. R. Co. v. Risty, 276 U. S. 567, 570.

Compare:

Sioux County v. National Surety Co., 276 U. S. 238;

Hawks v. Hamill, 288 U. S. 52.

See also:

Fairfield v. County of Gallatin, 100 U. S. 47;

Mackay Telegraph & Cable Company v. Little Rock, 250 U. S. 94;

Farncomb v. City and County of Denver, 252 U. S. 7.

V.

The Statutes (Ga. Laws 1919, pp. 934 et seq; Ga. Laws 1924 pp. 534 et seq.), Which Authorized the Assessments Against Appellants for a Part of the Cost of Improving the Streets Occupied by Their Tracks, as Construed by the Supreme Court of Georgia, Do Not Require, as the Basis for Their Operation, the Existence of Special Benefits to the Property of Appellants.

The Supreme Court of Georgia in its decision rendered September 30th, 1935 (Record, page 129 et seq.), held:

> "2. The City of Decatur, under the constitution and general law of this State and under its charter and the amendments thereof, had legislative authority to pave its streets and to assess a portion of the costs of such improvement against the street-railway company occupying and using, with the consent of the city, the street paved, irrespective of benefit to the company. This authority comes both within the taxing and the police power reserved in the State."

In the opinion (Record, pages 136-7) the Court said:

> "When the Georgia Power Company was organized and chartered, the general law of the State, enacted under the State constitution, in reference to street and interurban railways expressly stipulated: 'Provided that no street railroad or interurban railroad incorporated under this chapter shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities; and provided further that all railroad companies incorporated under this chapter shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them with reference to the railroad or the properties thereof located within the limits of said municipal corporation.' Code of 1933, section 94-1002. The City of Decatur was duly incorporated by act of the General Assembly. By legislative acts approved August 18, 1919, and August 12, 1924, (Ga. L. 1919, p. 934; 1924, p.

534), amending the charter of the City of Decatur, the General Assembly of this State conferred full power and authority upon the city, in the discretion of its commissioners, to pave any street therein, and, when street-railway tracks are located in a street ordered paved, to assess the cost of paving of that portion of the street between and for two feet on each side of said tracks against the company owning the tracks, and to assess the remainder of such costs against the abutting property. When the Georgia Power Company accepted its charter and with the consent of the city entered on its streets with its railway-tracks, it did so subject to the general law of the State and to the power of the State to amend the city charter by further legislation dealing with the upkeep of the streets. Under its laws the State reserves the power and authority to withdraw, alter, or amend private charters. Under the laws of this State this legislation was authorized. The Code of 1933, section 79-101, provides: 'Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations.' And 'In all cases of private charters granted since January 1, 1863, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.' Section 22-1202.

"So when the Georgia Power Company was organized and with the consent of the city entered on the streets with its railway-tracks, it did so subject to the general law of the State and the power of the State to amend the city's charter by further legislation with respect to the upkeep of the streets."

VI.

The Statutes Under Which the Assessment Against the Appellants Was Made, as Construed by the Supreme Court of Georgia, Does Not Deprive Appellants of Any Right Guaranteed Them by the Constitution of the United States; But Such Statutes are Valid as an Exercise of the Power Reserved by

the State to Alter or Amend Private Charters, and of the Police Power of the State.

It is well settled by the decisions of this Court that assessments against street railway companies for street improvements, in respect of streets occupied by their tracks, are sustainable, not upon the theory of special benefits to their property (as in the case of abutting owners), but upon the principle that the state has the power to make reasonable classifications, and to impose different burdens upon different classes, and the power to alter or amend corporate charters.

Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, 274 U. S. 387;

Fairhaven & Westville Railroad Company v. City of New Haven, 203 U. S. 379;

Sioux City Street Railway Company v. Sioux City, 138 U. S. 98;

Durham Public Service Company v. City of Durham, 261 U. S. 149.

In *Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith, supra,* it was held:

> "Constitutional power reserved to the legislature to alter any corporate charter permits the imposition upon a street railway company of the cost of street paving without violating the constitutional provision against impairing the obligation of contracts, although the provision was not in its franchise contract.
>
> "The imposition upon a street railway company of the cost of street paving which its franchise contract does not require it to meet does not unconstitutionally deprive it of property without due process of law, since it might have been included in the original charter, and has a reasonable relation to the object of the grant and the duty of the state to maintain its highways."

In *Fair Haven & Westville Railroad Company v. City of New Haven, supra,* it was held:

> "The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair." (Headnote 2.)

In the opinion by Mr. Justice McKenna, it was said:

> "Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state? Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state,—the establishment, maintenance, and care of its highways." (Pages 389, 390.)

In *Sioux City Street Railway Company v. Sioux City, supra,* it was held that under the provisions of the Iowa code:

> "the legislature has power to repeal and amend the articles of incorporation of a company, and to impose any conditions upon the enjoyment of its franchise which the General Assembly may deem necessary for the public good."

In the opinion, Mr. Justice Blatchford, on this subject, said:

> "The Company took its franchise subject to such legislation as the State might enact. This is plain from the provision of section 1090 of the Code. The Company took its charter subject to the provisions of that section. The General Assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the City, by any contract with the Company, to deprive the Legislature of the power of taxing the Company. * * *
>
> "Under section 1090 of the Iowa Code, the Legislature had the power not only to repeal and amend the articles of incorporation of the Company, but to impose any conditions upon the enjoyment of its franchise which the General Assembly might deem necessary for the public good. The reservation of this power was a condition of the grant." (Pages 106, 107.)

VII.

No Unfair Discrimination Against Appellants.

It is not unfair discrimination against a street railway company, which occupies with its tracks a portion of a street, to require such company to pay a fair portion of the cost of paving such street, although there is no immediate or direct benefit to its property on such street from such improvement, and although assessments against abutting property owners must be based upon special benefits to such abutting property.

> "The power of the legislature to make reasonable classifications and to impose a different burden upon the several classes cannot be denied. There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks."
>
> *Durham Public Service Company v. City of Durham,* 261 U. S. 149, 154.

VIII.

The Fact That the Appellants, Because of the Five-Cent Fare Contract, Cannot Operate This Line at a Profit Affords No Reason for Relieving Them from the Payment of the Assessment.

In *Fort Smith Light and Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith*, 274 U. S. 387, it was held:

> "The imposition of burdens otherwise legitimate upon a public service corporation cannot be held invalid as confiscatory because the permitted rate for its service does not allow an adequate return, and therefore a street railway company cannot avoid payment of a street paving assessment because it loses money in the operation of its road at the rate allowed." (Headnote 4.)

In *Milwaukee Electric Railway & Light Company v. State of Wisconsin*, 252 U. S. 100, it was held:

> "A street railway company's contractual duty to repave that part of a street which lies between its tracks and for 1 foot outside cannot be evaded on the theory that this additional burden will reduce its income below a reasonable return on the investment." (Headnote 2.)

IX.

The Decision of the Supreme Court of Georgia Rests Upon an Independent Ground Not Involving a Federal Question and Broad Enough to Maintain its Judgment; That is, Upon the Ground of Estoppel; and, Therefore, the Judgment of That Court Should be Affirmed or the Appeal Dismissed Notwithstanding That There Was Also a Federal Question Involved.

The Supreme Court of Georgia in the decision now under review held (Record, page 130):

> "3. Where a city, in conformity to legislative authority and its ordinances, paved and incurred the expense of paving a street occupied by a street-railway company, and where the company, with knowledge that the city in-

tended, in conformity to its charter and ordinances, to charge the company with a part of the expense of such paving, stood by and saw the paving done and the expense incurred, without instituting any legal action to prevent the same, it was thereafter too late for such company to avoid payment on the ground that enforcement of the assessment will deprive the company of its property, in violation of the due-process clauses of the State and Federal Constitutions."

In the opinion, in discussing this question, the Court said:

"There is another cause, not inconsistent with the opinion of the United States Court, why the judgment of the lower court should be affirmed. The direction of the verdict was demanded. The paving in question was commenced in May, 1925, and completed in May, 1926. While the street-railway company protested against the pavement and threatened to abandon its line on account of same, yet it took no legal steps to prevent the paving. * * * At the time of the paving, which was done in accordance with the law, the street railway was being operated by the Georgia Railway & Electric Company. This company stood by and without any legal action permitted the paving and the expense thereof to be incurred, with knowledge that the city intended to hold it liable for a portion of such expense. Thereupon the paving assessment became a binding obligation upon the company. Afterwards this company merged into the Georgia Power Company, which company in the merger assumed to pay all assessments outstanding against the electric company. It is now too late to raise the question that the city abused its legislative discretion in ordering the paving and making the assessment for the costs thereof. The Georgia Power Company is estopped, by reason of the laches of the Electric Company in the premises, from making the defense offered against the payment of the assessment. This conclusion is in line with numerous decisions of this court."

The Supreme Court of Georgia also points out, in this and in its former decisions, that the only protest that was ever made by the power companies concerning the proposed paving of the street was to the effect that, because of the five-cent fare contract which the power companies had entered into with the City of Decatur, those companies were not able to operate this particular line at a profit, and should therefore not be required to bear their legitimate portion of the cost of paving the street, and they offered to surrender to the City of Decatur the franchise for this particular line and to abandon its operation. The power companies did not claim, or undertake to claim, in any protest made by them against the proposed paving, that the paving was not necessary or that the character of paving proposed was unreasonably expensive. They simply claimed that because of the five-cent fare contract they could not afford to pay their portion of the expense of the paving. The court also calls attention to the fact that the power companies undertook to abandon this line for the purpose of avoiding its obligations under the five-cent fare contract. The Supreme Court of Georgia had, in a previous decision (*Georgia Power Company v. City of Decatur,* 168 Ga. 705), held that "to allow the power company to surrender its franchise or permit and to tear up its tracks would in effect be to allow that company to terminate a contract which has been held valid and which is binding upon the power company because of its relation to the corporation which entered into the contract and received the benefits thereof; and this cannot be done because of the law which makes a valid contract effective according to its terms." In the opinion (168 Ga. 705), it was recited: "This suit had its origin in the decision of the City of Decatur in 1925 to pave its streets in accordance with an act of the legislature of Georgia and to assess certain of the expense of paving against the street railway. On July 9th, 1925, plaintiff in error notified the City of Decatur that unless it was relieved of the burden of this paving expense it would be 'willing to surrender to the City of Decatur the franchise for this line and remove the tracks from the street.' The City refused this proposition."

The Supreme Court of the United States in *Georgia Power Company v. Decatur,* 281 U. S. 505, 511, in reviewing the decision of the Supreme Court of Georgia (168 Ga. 705), held: "The losses attributable to the stretch of track in question and the five-cent fare are immaterial while the rate contract continues," and affirmed the judgment of the Supreme Court of Georgia enjoining the Power Company from abandoning the operation of this line.

The acts of the Legislature under which the paving assessment was made (Georgia laws 1919, page 934 et seq.; Georgia laws 1924, page 534 et seq.) provide for the giving of notice before the paving ordinance is adopted and for a hearing on the proposed ordinance so as to permit any person to be affected to contest the proposed plan.

> "A judgment of a state court based upon an estoppel on general principles of law and a statute of the state, irrespective of any Federal question, as an independent ground broad enough to maintain its judgment, cannot be reviewed in this court on writ of error, although a federal question was also decided."
>
> *Gillis v. Stinchfield,* 159 U. S. 658.

> "This court will not entertain jurisdiction of a state judgment, where, besides the federal question alleged to have been decided by the state court, it proceeded in part upon another and distinct ground not involving any federal question and sufficient in itself to maintain the judgment without reference to that question."
>
> *Beaupre v. Noyes,* 138 U. S. 397.

> "Where a finding, which does not involve a federal question, is broad enough to maintain the decree, even though the federal question involved in another defense was decided wrong, this court will affirm the decree, without considering that question or expressing any opinion upon it."
>
> *Jenkins v. Lowenthal, et al.,* 110 U. S. 222.

"The question of the estoppel of a party to deny the validity of a mining location does not constitute a federal question for review by the Supreme Court of the United States on writ of error to a state court."

Speed v. McCarthy, 181 U. S. 269.

To the same effect, see also:

Gaar Scott & Company v. Shannon, 223 U. S. 468;

Moran v. Horsky, 178 U. S. 205;

Northern Pacific R. Co. v. Ellis, 143 U. S. 458;

Rector v. Ashley, 73 U. S. (6 Wall.) 142;

Hale v. Akers, 132 U. S. 554.

It does not matter that the Supreme Court of the United States may think the state court wrong in believing that there is evidence to support the decision on the non-federal ground.

Leathe v. Thomas, 207 U. S. 93;

Eustis v. Bolles, 150 U. S. 261.

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a federal one."

Pierce v. Somerset Railway, 171 U. S. 641, 648.

To the same effect, see:

McGregor v. Hogan, 263 U. S. 234;

First National Bank v. Board of County Commissioners of the County of Weld, 264 U. S. 450;

Chicago, M., St. P. and P. R. Company v. Risty, 276 U. S. 567, 575.

Appellants, in their brief, (page 24) and "Appendix A," refer to certain extracts from a brief which they say was filed in the Supreme Court of Georgia by counsel for the City of

Decatur in *Georgia Power Company v. City of Decatur,* 168 Ga. 705. This, of course, is outside of the record. We merely call the Court's attention to the fact that the present counsel representing the City of Decatur were not of counsel in that case, as shown by the official report of the decision. (168 Ga. 705.)

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 625.—October Term, 1935.

Georgia Railway & Electric Company, et al., Appellants, *vs.* City of Decatur. } Appeal from the Supreme Court of the State of Georgia.

[March 30, 1936.]

Mr. Justice McReynolds delivered the opinion of the Court.

April 29, 1935 (295 U. S. 165), we reversed the decree pronounced by the Supreme Court of Georgia in this cause, September 18, 1934 (179 Ga. 471), and sent it back for further proceedings not inconsistent with the accompanying opinion. That opinion discloses the circumstances of the litigation and our reasons for reversal.

After notice to the parties, the Supreme Court, with felicitous recognition of obligation to do nothing in conflict with the ruling here, again considered the original record. September 30, 1935, after disclaiming any purpose theretofore to construe the pertinent State statutes as unhappily chosen words had led us to conclude, it announced their meaning and once more affirmed the decree of the trial court — Ga. A second appeal gives us jurisdiction.

Appellants insist, first, that the decree presently challenged is not consistent with our opinion and mandate; and, second, that, if the Georgia statutes be construed and applied as finally ruled by her Supreme Court, they will be deprived of equal protection and due process of law, contrary to the Fourteenth Amendment.

As appears from our opinion of April 29, 1935, following long established doctrine, we accepted the construction of the statutes placed upon them by the Supreme Court and decreed accordingly. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 159; *Chicago, etc. Railroad Co.* v. *Risty*, 276 U. S. 567, 570. So regarded, they empowered the municipality to assess paving costs against the utility only upon the basis of benefits received. And, as appellants had been deprived of opportunity to show the absence of advantage, we held due process of law had been denied.

After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants of a federal right. We suggested no interpretation of our own, and did not affirmatively indicate the further action to be taken. *Schneider Granite Co.* v. *Gast*, 245 U. S. 288, 291. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly.

In the circumstances disclosed by the record, will appellants be deprived of the equal protection or due process of law if the State statutes, as finally interpreted, are applied to them?

Upon this point, counsel submit:—Under the statutes as construed, other parties would be subject to assessment by the municipality for the cost of paving only upon the basis of benefits; appellants would be liable without regard thereto. Street railways are entitled to the same constitutional protection accorded to others. Also, that if the special assessment was product of the police or taxing power, the utility was entitled to a judicial hearing in respect of its unreasonable or arbitrary exercise.

Considering our declarations in *Durham Public Service Co.* v. *Durham*, 261 U. S. 149, that "There are obvious reasons for imposing peculiar obligations upon a railway in respect of streets occupied by its tracks," we cannot say the Supreme Court erred in concluding there was no violation of the equal protection clause. *Fort Smith Light Co.* v. *Paving District*, 274 U. S. 387.

The power of the municipality to require a street railway to pave streets used by it, without regard to benefits, is clear enough. *Durham, etc. Co.* v. *Durham*, *supra*; *Southern Wisconsin Railway Co.* v. *Madison*, 240 U. S. 457, 461. The court below recognized the general right to demand inquiry concerning arbitrary exercise of the taxing or police power, when adequately alleged. But it found that appellants had not set up that defense, except as im-

plied in the claim that any assessment not based on benefits was arbitrary and unreasonable. The court, we think, correctly said—

> "There is no question as to the regularity of the assessment under the general law of the State, and the charter of the city as amended, and the ordinances duly enacted thereunder. It has already been determined that the paving was done and that the assessment therefor was made in conformity to the law. Payment therefor is undertaken to be avoided by the power company on the ground that the pavement was of no benefit to the company. It has been held by this court, in construing the law of the State in reference to street paving and cost thereof, that a street railway could not defend against the payment on the ground of no benefit."

Appellants have failed to show deprivation of any federal right through denial of opportunity to rely upon an adequate defense, properly advanced. We need not, therefore, consider the conclusions of the Supreme Court concerning an estoppel.

The questioned decree must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.